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872  
871  
No. 2393

IN  
**The United States Circuit  
Court of Appeals**  
Ninth Circuit

**THE STEAMER SAMSON, and BARGE No. 8,  
BARGE No. 9 and BARGE No. 27**

**COLUMBIA CONTRACT COMPANY,  
a Corporation  
CLAIMANT AND APPELLANT**

**SHAVER TRANSPORTATION COMPANY,  
a Corporation  
LIBELLANT AND APPELLEE**

**STANDARD OIL COMPANY OF CALIFORNIA,  
a Corporation  
RESPONDENT IN PERSONOM**

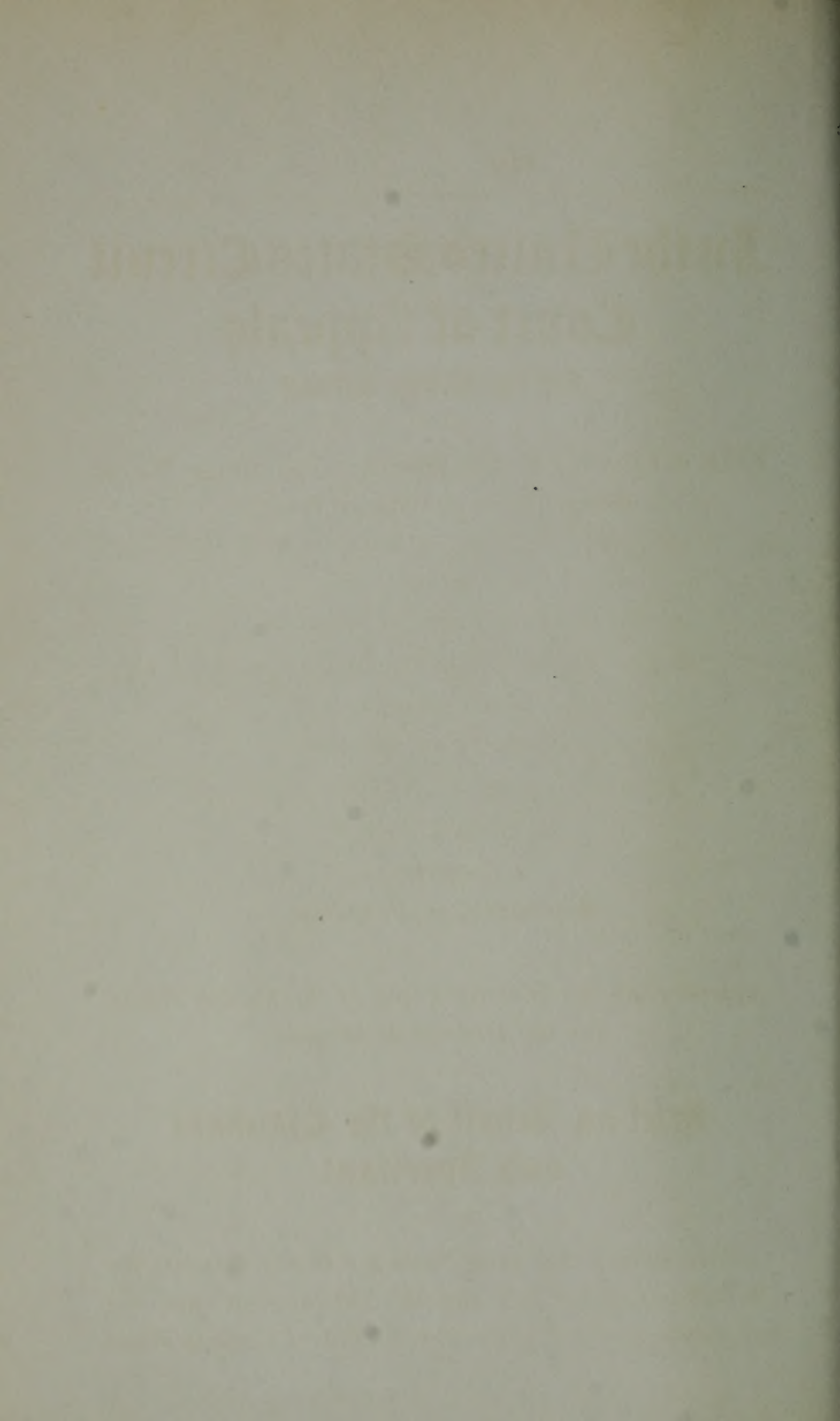
**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON**

**Brief on Behalf of Claimant  
and Appellant**

**TEAL, MINOR & WINFREE  
ROGERS MAC VEAGH  
Practors for Appellant**

**WOOD, MONTAGUE & HUNT  
Practors for Appellee**

**FILED**





Records of U.S. Circuit  
Court of Appeals  
872





No. \_\_\_\_\_

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**In the United States Circuit  
Court of Appeals  
for the Ninth Circuit**

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THE STEAMER "SAMSON," and Barge No. 8,  
Barge No. 9 and Barge No. 27,  
COLUMBIA CONTRACT COMPANY,  
a Corporation,  
*Claimant and Appellant,*  
SHAVER TRANSPORTATION COMPANY,  
a Corporation,  
*Libellant and Appellee,*  
STANDARD OIL COMPANY OF  
CALIFORNIA,  
a Corporation,  
*Respondent in Personam.*

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*Appeal from the District Court of the United States  
for the District of Oregon*

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**Brief on Behalf of the Claimant  
and Appellant**

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This controversy arose from a collision between the "Samson" and her tow and the "Henderson" and her tow which occurred in the waters of the Columbia River

at 1:40 A. M. on the 22nd of July, 1911. The "Henderson" was sunk and libel proceeds upon the theory that the "Henderson" was a total loss. The oil barge in tow of the "Henderson" was not damaged; the "Samson" was not damaged. The "Samson's" tow consisted of three barges loaded with stone for the jetty at the mouth of the Columbia River; Barge No. 9 lashed to the "Samson" on the port side; Barge No. 8 lashed to the "Samson" on the starboard side and Barge No. 27 lashed to Barges Nos. 8 and 9 and extending directly in front of the "Samson;" each of these barges contained about 1,000 tons of stone.

The "Henderson" is a stern wheel steamer 180 feet in length, 31 feet beam and about 4 feet draft. The oil barge in tow of the "Henderson" is a sea-going steam barge designed to carry fuel oil in bulk; she is 280 feet long, has a beam 54.4 feet and a depth of hold of 23.4 feet; she is fully equipped in all respects except that she has no propelling power of her own. The "Samson" is 120 feet long, has 34 feet width of beam and 14 feet depth of hold; she is a sea-going tug with a right-hand propeller; Barges 8 and 9 are each about 150 feet in length, have about 38 feet width of beam and draw, when fully loaded, between nine and ten feet; Barge No. 27 is about 140 feet in length, has about 38 feet width of beam and draws, when fully loaded, between nine and ten feet. Barge No. 8 was uninjured; Barges 9 and 27 were both injured.

The evidence in the case is exceedingly conflicting, so that it may be said that it is impossible to reconcile

the evidence. Your Honors must, therefore, consider the stories as told by the several witnesses and from such stories ascertain, if possible, the responsibility for the collision. These stories may be sub-divided into three classes: first, the story of the pilot and crew of the oil barge and "Henderson;" second, the story of the crew of the "Samson" and of the barge tender; third, the story of the fishermen. Certain facts clearly appear to be admitted by all parties. These facts are:

(1) The "Henderson" with the oil barge in tow left Astoria at 8.45 P. M. on the 21st of July, 1911. Ebb tide started at Astoria at about 9:40 P. M., and, at the point of collision, about one and three-quarter hours later.

(2) The collision occurred at some point between Puget Island and Tenas Illihee Island in the Columbia River approximately twenty-seven miles from Astoria at the hour of 1:40 A. M. of July 22nd.

(3) The steam "Henderson" with her tow passed the steamer "Kern" with her tow shortly before the collision. These boats passed to starboard.

(4) The oil barge carried a green light on the starboard side and the "Henderson" a red light on its port side, and such lights are presumed to have been adjusted as required by law. The "Henderson" also carried masthead lights indicating that she had a tow. The "Samson" carried a green light on her starboard side and a red light on her port side in conformity with the requirements of the law, and masthead lights indicating that she had a tow. It is conceded that in addition



to these lights there was a bright white light on the starboard side of the starboard barge. The evidence on the part of the "Samson" and her crew also shows that there was a similar white light on the port side of the port barge, but the officers and crew of the oil barge and "Henderson" testify that they did not see such light on the port barge. The rules of navigation do not require that such light shall be carried, but it is conceded that such lights were carried, as a rule, on the tow of the "Samson."

(5) The navigation of the "Henderson" and her tow was directed entirely by the pilot on the oil barge, the helm of the "Henderson" being kept amid ships at all times until the collision occurred.

(6) The barges in tow of the "Samson" had neither motive power nor any means of steering themselves. They are propelled by the "Samson" and steered by the "Samson."

(7) Upon each of these barges comprising the tow of the "Samson" there is a barge man at all times and each barge was supplied with anchors.

(8) The "Samson" and her tow were seen by the officers and crew of the oil barge and "Henderson" when she rounded the point of Puget Island opposite Bugby Hole and at about the same time the "Henderson" and oil barge were seen by the officers and crew of the "Samson."

(9) At all times until within a few seconds of the collision both colored lights of the "Samson" were in

full view of the officers and crew of the oil barge and "Henderson," and both colored lights of the "Henderson" and oil barge were in sight, in like manner of the officers and crew of the "Samson."

(10) The night was clear but dark—no fog.

(11) The oil barge came to anchor about 300 feet from the Oregon shore and below the bluff and at anchor was tailing down stream toward Prairie or Clifton Channel.

(12) The oil barge gave the first passing signal of one blast of the steam whistle, indicating her intention to pass to port. This was promptly answered by the "Samson," but this signal was not given or exchanged until sometime after the vessels came in sight of one another.

(13) When the vessels were between 200 and 500 feet of one another the oil barge gave a second passing signal, also by one blast of the steam whistle and at this time the colored lights of each vessel were in full sight of the officers and crew upon the other vessel. The testimony of the officers and crew of the "Samson" shows that this signal was also answered in a like manner, but only one of the crew of the oil barge and "Henderson," the helmsman, testifies that he heard such answer, the other witnesses on behalf of the "Henderson" and oil barge testifying that they did not hear this signal answered, but do not say that no answer was given.

(14) The width of the river at the point of collision—whether the location claimed by the oil barge

and "Henderson" be regarded as the true place of collision, or whether the location of the collision made by the officers and crew of the "Samson" be taken—is between 2,200 and 2,500 feet and there is ample water for at least 2,000 feet of this width.

## I.

### THE STORY OF THE PILOT, OFFICERS AND CREW OF OIL BARGE AND HENDERSON.

The story of Edward Sullivan, Pilot, who had charge of the navigation of the "Henderson" and oil barge is substantially as follows: The vessel left Astoria at 8.45 P. M. and passed Skamokawa light, twenty miles distant, at twelve o'clock. When about four miles past Skamokawa light he was steering on a range light known as "Hunting Island Range" which light was astern of him, and this range light marks the dredged channel; at this time he was slightly above the lower point of Puget Island when he observed the lights of a steamer making the turn around the bend of the river; he saw both colored lights, also the tow lights and a single white light on one side; he at once recognized by the lights and the peculiar arrangement of the lights that the steamer he was meeting was the "Samson" with three rock barges loaded with rock, and he "at once made provision to pass her on the right hand side," and to indicate to her pilot that he intended to do so, he put his helm slightly to port, running off in a direction at an angle to the range until he reached a point which, in his judgment, was between 500 and 600 feet below the



range light; he then straightened up parallel with the range and steered for the high bluff—used the bluff as a mark to steer for; that when he had proceeded upon this course until he came within what he estimated to be one-half mile from the “Samson;” he then blew a long blast of the steam whistle on the barge and this was promptly answered by the “Samson” with one blast; each vessel continued upon its course; both lights of the “Samson” were showing and he so continued on his course until he reached a point where he judged his vessel was about 500 feet from the “Samson” and her tow; the relative position of the passing steamer seeming to be about the same; then he thought it was scarcely reasonable for him to turn further to the right on account of the shore and was becoming alarmed that there was danger of colliding with the bank and so he blew another blast of the whistle but does not remember whether it was answered or not; just prior to that time he asked the lookout who was standing on the bow if there was anyone who could handle the anchors if needed, and, having received an affirmative answer, felt no apprehension on that point; the course of the “Samson” was still unaltered and it appeared to him that there was some danger of their getting together, so that he then ordered the helm of the barge hard aport and swung into shore and told the watchman to stand by his anchor and he then disappeared and went below and he did not see him afterward; the barge answered the helm promptly and swung rapidly toward the beach, but the “Samson” came on past the bow and he saw that the barge would clear but that the tow of the “Samson” would

catch the "Henderson," so he then called to the pilot of the "Henderson" and ordered him to stop and back his helm to port full speed; the port barge of the tow on the "Samson" struck the bow of the "Henderson" just forward of the house, broke the "Henderson" adrift from the barge and left the barge free; he paid no further attention to the "Henderson" but immediately ordered the man below to let go his anchors, and this was promptly done. (Record, Vol. 1, pp. 91 to 111.)

This witness further testifies that the oil barge came up on her anchor chain without any jar that he heard and that she was then anchored about 150 feet from some old piling which is near the water line; that the oil barge did not move at all from the time of coming to anchor until the next morning when it was taken in tow by another boat; that the "Henderson" drifted away in the general direction of the channel and that her lights went out in a few minutes; that the captain of the barge, as soon as the anchors went down, launched a boat which went to the rescue of the "Henderson," but did not reach the "Henderson" until after the persons on the "Henderson" had been rescued by some fishermen; that the oil barge steered well; and that the width of the channel at that place from the high bluff across to Puget Island is shown by the chart to be about 1,800 feet. (Record Vol. 2, pp. 143 to 148.)

This is the story of the pilot having charge of the navigation of the "Henderson" and her tow and he may be said to be in the interested witness on behalf of the libellant.

The witness Sullivan was cross-examined, not only upon his testimony given upon this trial, but upon his testimony given before the inspectors. He admitted that when he was examined before the inspectors he had located the oil barge, when the "Samson" was first seen, considerably farther down stream but that when he remembered that the "Samson" was moving faster than the oil barge, he changed his testimony in regard to his position in the river when he first saw the "Samson," because he had placed the "Samson" nearer to his location of the point of collision than he had placed his own vessel (Transcript pp. 149 to 154). He admitted having passed the "Daniel Kern" to starboard and testifies that he passed the "Kern" about abreast of the Sand Bar (Transcript p. 155). The oil barge kept no log. On page 158 of the transcript he modifies his testimony given on direct examination and testifies that the only order he gave regarding the anchor was given after the second signal was given and that in his examination before the inspectors he had not mentioned this order at all. He testifies that he did not give any order to the helmsman to change the course at all when he blew the first signal; that he changed his course when he first saw the "Samson's" lights and then changed again after the second signal and that these were the only orders which he gave to change the helm. (Transcript pp. 160-161.) This witness was cross-examined at length upon the chart offered in evidence upon the direct examination. (Libelant's Exhibit 1.) Upon this chart he had located the position of the oil barge at the time the "Samson's" lights were first seen, the position

of the "Samson" at said time, the bluff on the Oregon side, and also the point of collision. He also indicated the Hunting Island Range lights and the line of lights, also the point where the oil barge was anchored, the point where the "Henderson" was aground; and on cross-examination he marks upon the chart the location of the oil barge when the first signal was given, the location of the "Samson" at that time, the location of the passing of the oil barge by the "Daniel Kern," the locations of the oil barge and "Samson" respectively at the time of the second signal and in making these locations he corrected the location of the "Samson" three times and the location of the oil barge once. (Transcript pp. 155 to 168.) On cross-examination he further testifies that he estimated the time between the second signal and the collision at about thirty seconds. (Transcript p. 175.) He further testifies on cross-examination (transcript p. 183) that he saw a light on the starboard rock barge, but did not see a light on the port barge; that he could not say whether the "Samson" answered his second signal or not; that he was very much occupied at that time (transcript p. 193); that he knew approximately where the rock barges were anchored the next morning, that they appeared to be anchored on the range in the neighborhood of the fishing traps, the location of which was fixed by the witness and one was anchored a little below the other two. Before the inspectors he testifies (transcript p. 199) that he estimated that the "Henderson" did not sink for two or three or five minutes and on page 201 that he had some apprehension of a collision at the time he gave the second signal—such an



apprehension that he took a chance of running his barge ashore rather than take the chance of having a collision with the "Samson" and her tow. He further testifies that he passed the "Kern" a quarter of a mile before he sighted the "Samson" (transcript p. 203) and on page 209 that the distance from where he thought he passed the "Kern" to what he deemed to be the point of collision was 3800 feet, and that he could run that distance in twelve minutes.

On re-direct examination he testifies that he remembers passing some fishermen, but does not remember swinging out of his course to avoid them, but he remembers that there was a fish boat between the "Kern" and the oil barge. (Transcript pp. 215-216.) At the request of the proctors for the libelant, the witness draws his course between the time he saw the "Samson" and the time of the collision, the line "F-G" on the chart representing his course swinging to starboard under a port helm after seeing the "Samson" that was coming with her barges and prior to the first signal; the line "G-H" representing the general course between the first and second signals, and the line "H-E" the course after the second signal. (Transcript pp. 216-217.) At the request also of libelant's proctors, he locates the "Samson" on the chart when he first sighted her at a point marked "K" and her position when the first signals were exchanged at the point "L," and her position at the time the second signals were exchanged the point "I." (Transcript pp. 217 to 220.) On page 232 of the transcript he states, upon re-direct examination, that the green light of the "Samson" was not shut out or

obscured until she passed the point where he was standing on the oil barge. On page 253 of the transcript, on cross-examination, this witness repeats that when he first saw the "Samson," his vessel was on the ranges, and further testifies (transcript p. 256) that there were no lights upon the boats by which he was able to see where the rock barge struck the "Henderson," but that all he saw was by the light of the night, and that from the course which the "Samson" with her barges was pursuing he would think that the center barge of the "Samson's" tow would also have struck the "Henderson."

During the examination of this witness by the proctors for the Standard Oil Company a chart "Exhibit 2" was introduced in evidence and upon this the witness located the oil barge as at the point "F" when the "Samson" was first seen and that at this point he put his helm to port. Upon the same chart he located the oil barge at the time he gave the first signal to the "Samson" at a point marked "1" and the "Samson" at that time at a point marked "L," and located the position of the oil barge at the time the second signal was given at a point marked "2" and the location of the "Samson" at that time at a point marked "I" and also located the point of collision (Transcript pp. 261-262).

## STORY OF MARTINSON, THE BOATSWAIN

Martinson was the boatswain on oil barge No. 93 and was the lookout on the oil barge. He testifies that he came on watch at twelve o'clock. (Transcript p. 112). He testifies that the only order he remembers receiving

from the pilot was when he sung out "Let go the anchor," and that at that time he was about 40 feet from the anchor and that he promptly let go the anchor. He further testifies that when the anchors were let go they went out fast, but that when the anchors hit the bottom they went out slowly; that the oil barge had but little headway; that she came to anchor less than her own length from the Oregon shore, and remained at anchor at this place until the next morning; that when she came up on her anchor she came up very slow with no strain on the barge at all. (Transcript pp. 113 to 115.)

He further testifies regarding the orders to the helmsman. He testifies that after the first signal was given, the pilot told the helmsman to port his helm and the oil barge swung toward the Oregon shore at once. After the second signal was given, the pilot ordered the helm hard aport, and that he also ordered the pilot of the "Henderson" to port her helm and back her. He further testifies that after the helm of the oil barge was put hard aport, the barge was headed toward the Oregon shore, toward some very high land. (Transcript pp. 115 to 117.)

On cross-examination this witness testifies that he had no responsibility in the lookout part, but that he saw the "Samson" a long time before the first signal was given; he estimates the time about four to five minutes, and he estimates that about three minutes elapsed between the first signal given by the oil barge and the second signal; that after the second signal was given, the "Samson" was so close that he had become alarmed that there would be a collision; and that just

before the second signal was given, Captain Sullivan was heard to say "That man don't seem to alter his course. Give him another whistle." (Transcript pp. 119 to 122.)

### STORY OF CHARLES KAYSER.

Charles Kayser was a seaman upon the oil barge and was wakened by the crash of the "Samson" running into the "Henderson." He testifies that he had heard one signal given by the oil barge and then fell asleep and that he heard another whistle given by the oil barge and fell asleep again after the second whistle. When he heard the crash he jumped out of bed and helped Martinson to let go the anchors, and that the anchors were let go very soon after the accident. He further testifies that the oil barge came up on her anchor chains very slow. (Record pp. 133 to 135.) He further testifies that he heard the signals given by the oil barge to the "Samson," but does not testify to having heard any answer to such signals. (Record p. 137.) He further testifies that he did not hear the passing signal exchanged between the "Kern" and the oil barge. (Record p. 137.)

### STORY OF WILLIAM KALBERG.

Kalberg was the *helmsman* on the oil barge with the rank of quartermaster; he went on watch at twelve o'clock and steered the oil barge under orders from pilot Sullivan. (Record p. 2018.) Regarding the passing signals he testifies that he heard the oil barge blow one whistle and that afterward he heard the oil barge blow another whistle, and that this *second whistle was an-*



*swered by the "Samson."* Regarding the orders given him by the pilot, he testifies as follows:

Q. Did you get any orders at that time, or near that time? (Referring to the time when the first signal was blown by the oil barge).

A. Well, I can't think of it, whether it was exactly at the time that the whistle blowed that I got the order or if it was after the whistle blowed. I don't know what that is. But I know I got an order to port the helm a bit, you know, so I put her over a little, you know.

Q. Yes.

A. Well, then, to my best recollection, why he blowed another whistle. Then a thing I do remember, the "Samson" answered.

Q. What?

A. The "Samson" answered his second whistle that he blowed a little after he blowed his first whistle.

Q. Now, as I understand you, you ported your helm a little somewhere near the time of the first whistle?

A. Well, I could not specify at the time, or when it was.

Q. No.

A. But it was somewheres around that time, anyway.

Q. Well, then, what other orders did you get?

A. I can't remember.

Q. Regarding the wheel?

A. Well, then he blowed the second whistle, why, I guess he saw there was going to be trouble there, and he says, "Hard aport" then; so the towboat with these

barges was still bearing right on us then. Of course, then he asked me again, "Is it hard aport?" And I says, "Hard aport all the time;" and she was paying off, you know.

Q. How quickly did you obey Sullivan's orders as you got them?

A. Instantly.

Q. Now you said that you answered him that you answered him that you had her hard aport and she was paying off?

A. Yes.

(Transcript pp. 2020, 2021.)

This witness further testifies that he received no orders from the pilot after the collision and he heard the pilot give the order to drop the anchors instantly and that that was done a minute afterward. (Transcript p. 2022.)

He further testifies that he heard the anchors go out plainly, but took no notice whether the barge came up upon the chains with a jerk or not. (Transcript p. 2023.)

On cross-examination he testifies on page 2025 that he did not hear the "Samson" answer the first whistle, but that he did hear the "Samson's" second signal. On cross-examination (Transcript pp. 2028 and 2029) he further testifies that he saw the lights of the "Samson" and her flotilla at the time the first whistle was sounded but did not see the vessel; that somewheres after the first signal was sounded, or in the neighborhood of that, the pilot ordered him to port the helm, that he obeyed that order and got no other order until the second signal

was given. On page 2030 he testifies that though he saw the lights of the "Samson," he cannot say how many lights he saw nor the color of the lights; and on page 2031 he says that the "Samson" did not appear to change her course at all and that he does not remember seeing either the red or green light of the "Samson" that night.

### STORY OF CAPTAIN C. B. SORLEY.

This witness was the master of the oil barge; he was asleep at the time of the collision and was aroused by one long whistle from the "Henderson" which he construed to be some danger of collision. The sleeping quarters were on the aft end of the barge. He saw the "Samson" and her tow sheering off from the "Henderson" at the time he got on deck, but did not know how many tows she had. As soon as he got on deck he gave orders to let go the anchors and the same orders were given about the same time from the forward end of the barge. (Transcript p. 2039, 2040). He testifies that the anchors were let go very promptly (p. 2040) and that when the barge came to anchor she was about 280 feet from the Oregon shore. This witness further testifies that the "Henderson" sank about a mile away from the oil barge and that all her lights went out in three or four minutes after he came on deck.

No other person who was on the oil barge was examined.

### STORY OF HENRY F. STAYTON.

This witness was the pilot on the "Henderson" and on duty at the time of the collision, acting under orders

from the pilot of the oil barge. The helm of the "Henderson" was kept midships. He went on duty at 1:20 by the pilot house clock and at that time the "Henderson" was on Hunting Island Range lights about abreast of lower Puget Island. (Transcript pp. 487 and 488.) He testifies that at this time the "Samson" was not in view, but came in view shortly after he went on watch. (Transcript p. 489.) He testifies that he noticed his vessel swinging off to starboard; that she swung off the range lights and opened them up fairly well, but that he had some apprehension that they were going too far over, as he feared they might strike the shallows at the head of Tenas Illihee Island, and that though they were pretty well over and the range lights opened up pretty well they steered a course about parallel with the range lights. (Transcript p. 490.) This witness testifies that he heard one whistle given from the oil barge and heard the same answered immediately by the "Samson;" shortly afterward the oil barge gave another whistle, but that he does not remember hearing any answer to that. When the whistles were given they were on the starboard side of the range lights. (Transcript p. 491.) He testifies that he saw the "Samson" come around the point of Puget Island, saw her green light and two masthead lights and the light on the starboard barge—a white light—and soon afterward saw the red light, and that the red and green lights remained in view up to the time of the collision. (Transcript p. 492.)

This witness further testifies that the port barge of the "Samson's" tow struck the "Henderson" on the port bow, about the corner of the house, and that he



did not see any barge strike the oil barge. (Transcript p. 494.) On page 495 he testifies that within a few seconds before the crash he gave the danger signal for the purpose of warning the "Samson" and to wake up the crew, and that about the time of the second signal it appeared to him that there was going to be trouble, so he waked the master or captain of the "Henderson" and when the captain came into the pilot house he gave place to the captain (transcript p. 496.) On cross examination he testifies that when he came on duty the vessels were off from the lower end of Puget Island; a little below that probably (transcript p. 504), and that at that time he noticed the range line and the vessels were on the range lights. Te testifies that three or four minutes probably after he came on duty he saw the "Samson" come around the point of Puget Island, and that about fifteen minutes after he came on duty the first signal was given by the oil barge and answered immediately. (Transcript p. 505.) On page 506 he testifies that Captain Sullivan was on the forecastle head of the oil barge, about 180 or 190 feet from where he stood in the pilot house but that *it was so dark he could not see him*; and on page 506 he testifies that from the location of the barges as they approached the "Henderson," *the center barge of the "Samson's" tow would have struck the "Henderson."* On page 511 he testifies that he estimated that the course on which the oil barge and the "Henderson" were running parallel with the range lines was distant from said range lines about 400 feet. This witness was examined before the inspectors and cross-examined in regard to the testimony

which he gave before the inspectors. He admits that before the inspectors he testified that the collision occurred below the seining ground on the Puget Island side about abreast of Little Slough and that he judged that was the place of the collision from the position of the oil barge the next morning. (Transcript p. 517.) This testimony was repeated more than once before the inspectors. (Transcript p. 519.) On page 520 he testifies upon this trial that when he noticed the "Samson's" lights he was just swinging down off the range. Before the inspectors he also testified (transcript p. 522) that when he first saw the "Samson" she looked like she was nearer the Island side, but he could not tell very well on account of the darkness.

This witness, on cross-examination, further testifies that there was a rope fender between the "Henderson" and the oil barge and that this rope fender was at a point on the starboard side of the "Henderson" about opposite where the "Henderson" was struck. (Transcript p. 526.) He further testifies on cross-examination that he saw the rock barges at anchor the next morning as he was standing at the time on the oil barge and that, in his judgment, the rock barges were anchored somewhere off Puget Island. (Transcript pp. 535-536.) In his examination before the inspectors (transcript pp. 541-542) he testifies that the rock barges were anchored on the starboard side of the range as you go down—a little nearer to the Island shore than to the Oregon shore and pretty well over to the Island.

## STORY OF WITNESS HENRY KNESS.

This witness was the fireman of the "Henderson." He testifies that he heard the stop bell, the reversing bell and the backing bell, but heard no other bells. Though he was on watch he was not examined in regard to the passing signals.

## STORY OF WITNESS CHRISTOPHER O'BRIEN.

This witness was chief engineer upon the steamer "Henderson," but was not on duty at the time of the collision but in his room. He testifies that the first he knew of the collision was the crash. (Transcript p. 575.) He estimates (transcript p. 578) that it was at least three minutes after the crash before the "Henderson" sank, and on page 579, that from the condition of the "Henderson" she could not have done any real effective backing after the collision.

## STORY OF WITNESS PHIL CROSSEN.

This witness was the *watchman* on the "Henderson" at the time of the collision and he testifies that at the time of the collision he was standing on the bow of the "Henderson" near the stem (transcript p. 1226), that from that place he went out on the upper deck, stood there awhile and then jumped on the oil barge. Prior to the danger signal he testifies (p. 1227) that he was *in the galley of the boat*. He testifies that though he was watchman, he paid no attention to the lights on the "Henderson" and her tow. (Transcript p. 1228.) On page 1229 he testifies that he saw the port barge strike

the "Henderson" right by the house cavil and did not see any other barge strike. He further testifies that he heard the three bells on the "Henderson," that he was standing on the oil barge when she anchored, that the anchors were loosed in one-half a minute and that the oil barge was drifting down stream. (Transcript pp. 1230 to 1232.) Though he was the lookout on the "Henderson" he admits that he did not know where they were in the river, that he heard signals from the oil barge but no answer from the "Samson." (Transcript pp. 1232 to 1233.) On cross-examination this witness testified that he paid no attention to the red or green light on the "Samson," that he saw one light on one of the barges of the "Samson's" tow, that he did not think the light was on the port barge because that barge was the nearest to him and he saw no light on it, but there was a light on the second barge from that one. This light, he testifies, he saw before the collision. He further testifies that he *did not see but two barges in the "Samson's" tow, and that the barge which struck did not have any light on it and was the one farthest in front.* (Transcript pp. 1238-1239.)

### STORY OF JOE OLESON.

This witness was assistant engineer on the "Henderson" on the night of the collision and was on duty. He testifies (transcript p. 480) that he don't remember hearing the passing signals, that he got one bell, a stop bell, a reverse bell and full speed astern; that after that he got a stop bell and then a go ahead bell and then another back up bell; that he obeyed these bells but that



the boat had no power at that time. (Transcript pp. 480 to 482.) The same witness (transcript p. 482) testifies that the "Henderson" was torn loose immediately by the collision and that he could not see either shore. On page 483 he testifies that when he slid into the water from the hurricane deck of the "Henderson," he came up, caught on something and climbed around on the hull, saw the "Samson" and that she was over toward the Puget Island shore. This, he states, was three minutes after the collision.

### STORIES OF THE FISHERMEN.

Charles Johnson, the first fisherman who seems to have been passed by the "Henderson," testifies that the "Henderson" passed him about three-quarters of a mile below the point of collision, just below Cathlamet Slough and above the sand bar (transcript pp. 386-387); that the "Kern" passed when he was on the tow head (transcript p. 388) and that he laid out his net just after the "Kern" passed him. He testifies that it takes five minutes to run from the tow head to the point where he begins to lay out his net, the laying out of the nets takes seven minutes and the drift thirty minutes and that the time from tow head to tow head would average about an hour and ten minutes. The "Henderson" passed him to starboard and was on the range line when she passed. He didn't hear the passing signals between the "Henderson" and the "Samson." He estimates that at the tow head the range line is about 900 feet away. (Transcript p. 403.) He testifies that he didn't see the "Samson" when the "Kern" passed. This witness fin-

ished his drift and did not drift again until seven A. M. (Transcript p. 410.) He testifies that at that time the stone barges were still anchored and locates all three barges upon the chart. (Transcript pp. 410-411.) He testifies that he saw the "Samson" pick them up but paid no attention to it. (Transcript p. 412.) He locates the one barge 600 feet from the Puget Island shore and the other two barges 900 feet from the Puget Island shore, and testifies that when the "Henderson" passed him, she passed at just about the spot where the one barge was anchored the next morning. (Transcript p. 413.) It does not appear who was in the boat with this witness, and, so far as the record shows, such person was not called as a witness.

Eddie Grove and Martin Loaland were fishing from the same boat. They were both called as witnesses. Eddie Grove testifies that he saw the "Kern" pass but don't know anything about when. It appears from the testimony, however, of Ole Grove that Eddie Grove and Martin Loaland had the turn in fishing next to Charles Johnson and Charles Johnson laid out his net after the "Kern" passed, from his own testimony. This witness also testifies that between turns the time is usually fifteen to twenty minutes. Eddie Grove testifies that he had just finished laying out his net when the "Henderson" passed him and was just below the tow head—the end of his net even with the range lights—and that the "Henderson" passed to starboard. (Transcript pp. 287-288.) He testifies that he saw the "Henderson" gradually swing toward the Oregon shore and far over (transcript p. 289) and that he saw the

"Samson" just after the "Henderson" passed. (Transcript p. 290.) He testifies that he heard the first signal and the answer and the second signal but don't remember hearing the answer, that he heard the danger signal, the crash and the noise of the anchor chains. (Transcript pp. 290 to 292.) He testifies that he finished his drift, then went to the tow head and then to the "Henderson" and locates the "Henderson" at that time as above the point of Tenas Illihee Island. (Transcript pp. 292-293.) He testifies that after he left the "Henderson" he laid out his net again and ran close to the rock barges which were anchored and he locates the rock barges and the point where he started to lay out his net on the chart. He testifies that two rock barges interfered with his laying out his net as they were on the Oregon side of the ranges. (Transcript pp. 294-297). This witness testifies that he could see the "Henderson" and the oil barge all the time and could see not only their lights and the mast of the oil barge, but the form of the boats up to the time of the collision. (Transcript pp. 308 to 312.) He testifies (transcript p. 311) that when the crash came he was at the lower point of Puget Island, and when he finished his draft he came back to the tow head. He testifies that he does not remember seeing any rock barges when he came up to the tow head. (Transcript pp. 316-317.) He locates the rock barges in the river upon the chart. (Transcript pp. 314 to 318.) He testifies that he saw no lights on the rock barges (transcript p. 321) and that he paid no attention to the "Samson's" lights. He testifies that he was on the tow head when the "Samson" picked up

the barges and that the tow head was not 1,000 feet from the range light and about 40 fathoms from the shore of Puget Island. He testifies that the danger signal, the crash and the noise of the anchor chains were heard by him at about the same time, and that the collision, in his judgment, took place right out from the bluff on the Oregon side of the stream, pretty close in. (Transcript pp. 291-292.)

The witness, Loaland, in the boat with Eddie Groves testifies substantially as the witness Eddie Groves does, in regard to the passing of the "Henderson"—the passing signals between the "Henderson" and "Samson," the danger signal, the crash and the anchor chains. He testifies substantially, as Eddie Groves does, regarding the finish of the drift, going back to the tow head, going to the "Henderson" and as to the location of the "Henderson" at that time. (Transcript pp. 322 to 336.) He testifies that he saw the stone barges—two lying on the Oregon side fifty fathoms from the range line and the other barge on the Washington side near the sand bar. (Transcript pp. 337 to 339.) He testifies that when they heard the first passing signal they were below the point of Puget Island (transcript p. 344); that he did not see the "Henderson" at the time of the collision (transcript p. 345); and that the "Henderson" at that time was about a mile away. He testifies that after finishing their drift they passed the one stone barge near the sand bar (transcript p. 347) and that they came up on the Puget Island side about fifty fathoms from the shore (transcript p. 348). He testifies that he first saw the "Samson" in Bugby Hole, but



don't remember what lights he saw. (Transcript p. 355.) In going from the tow head to the "Henderson" he testifies that he passed below two barges, but he does not remember any lights on any of the barges. (Transcript p. 350.) He does not remember seeing the red or green light of the "Henderson" and oil barge. (Transcript p. 369.)

The witness Elias Dahl and Ole Grover were fishing in the same boat. Dahl in his testimony (transcript p. 356 to 386) testifies that he saw the "Henderson" from the tow head and saw the "Samson" from the tow head coming around the bend in Bugby Hole; that he noticed the course of the "Henderson" hauling over toward the Oregon shore; that he heard the "Henderson" blow one whistle and heard the answer; that he heard the "Henderson" blow another whistle, but don't think he heard it answered; that he heard the danger signals, the crash of the collision and the anchor chains; and that the danger signal, the crash and the anchor chains came altogether. (Transcript, pp. 357-358). He saw the "Daniel Kern" but does not give any particulars about it. (Transcript, p. 359.) He saw the two barges after they were anchored, but not the one barge, and noticed that the two barges were on the Oregon side of the range lights,—he estimates about fifty fathoms. (Transcript, pp. 359-360.) He testifies that he went to the "Henderson" with Ole Grover and *that they did not take any people off the "Henderson," and locates the "Henderson" at that time as a little below the bluff and thinks they reached the "Henderson" four or five minutes after the collision.* (Transcript, p. 360.)

He testifies (Transcript, p. 362) that he didn't see the boats at the time of the collision, but saw shadows and lights, and states that they were a little below some trap piling near the bluff on the Oregon side. (Transcript, p. 362.) On cross-examination (Transcript, p. 365) he testifies that he had not seen the "Samson" when he first saw the "Henderson"; that *when he first saw the "Samson" the "Henderson" was about abreast the lower end of Puget Island* and the "Samson" had just come around the bend up the river. He testifies that he saw the bright lights of the "Samson" over the woods, *afterwards saw the red lights of the "Samson" but never saw any green lights on the "Samson."* (Transcript, pp. 366-367.) He testifies (Transcript, pp. 368-369) that he did not see the red light of the "Samson" at the time of the first signal nor at the time of the second signal, and does not remember seeing any colored lights on the "Henderson," or remembers seeing any lights on the oil barge. He testifies (Transcript, p. 371) that only a few seconds elapsed, in his judgment, between the second signal, the danger signal, the crash and the noise of the anchors. He testifies (p. 372) that when he reached the "Henderson" there were no lights on the "Henderson," and that she was on the bottom, but not in the same place at which she was the next morning. He testifies that he did not see the rock barges when he went over to the "Henderson" but saw them when he came back from the "Henderson." (Transcript, p. 374. He testifies (Transcript, pp. 377-378) that he did not see the "Samson" pick up the rock barges; that one rock barge was anchored below the sand bar. He

testifies (p. 379) that he looked at the range of lights when he went over to the "Henderson" and when he came back from the "Henderson," but not for the purpose of determining on which side of the range lights the rock barges were; that he looked at the range lights at the time he saw the rock barges. He testifies (Transcript, p. 382) that he does not know whether the "Samson" had a line on the "Henderson" or not. On page 383, upon his re-direct examination, this witness repeats and *insists that he saw the red light of the "Samson" when she came around the point of Puget Island*, and on page 385 insists that he does not know of their taking any passengers off the "Henderson."

Ole Grove testifies (Transcript, pp. 417 to 434) and again on pp. 452 to 479; he was Dahl's partner, and they were lying at the tow head waiting their turn and saw the "Henderson" when she came up the river and the "Samson" when she came down. He testifies (Transcript, p. 419) that when he first saw the "*Henderson*" she was *a little above the range lights,—about half way between the range lights and Puget Island*; when she passed the tow head she made a turn to pass the boat in which Eddie Grove was, and after she passed Eddie she turned a little back toward the Oregon shore. He testifies (Transcript, p. 421) that the "Henderson" went over to the Oregon shore, but he did not think she was going too far over; that he saw the "Samson" and that the "Henderson" passed that fisherman and then *as she passed him*, about abreast of the tow head, *the "Henderson" blew the first whistle* and that this whistle was answered by the "Samson," and that from there the "Henderson" and

the oil barge kept on their course "kind of" on the Oregon shore, and then in a little while the signals were blown from the oil barge or "Henderson" and then they paid no particular attention until there were three or four more whistles blown. On page 422 he says: The "Samson" came down and didn't seem to change its course at all; then he heard three or four whistles, a crash, the anchors and saw the "Samson" put a search light on the "Henderson" and saw the "Henderson" sink. Then he, with his partner, went over to the "Henderson" as fast as they could go. On page 423 he says he passed near the "Samson" and the stone barges on his way over to the "Henderson," and that some one on the "Samson" spoke to them, that *they took three people from the "Henderson,"* and that at that time the "Henderson" was sunk and lying on her side. He estimates that it took five minutes for him to reach the "Henderson." On page 424 he testifies that he could see the lights of the boats when they collided and that, in his judgment, the collision occurred about fifty feet below the bluff on the Oregon side,—just about the same place where the oil barge was anchored the next morning. On page 426 he testifies that they did not make another drift that night, that they saw the stone barges were in the road and went home and had breakfast, after which they came back again, and at that time he saw stone barges about seventy-five fathoms on the Oregon side of the range opposite the tow head and saw the "Henderson" (Transcript, p. 428) lying a little above the point of Tenas Illihee Island. On page 454 he testifies that from the tow to the mouth of Grove's Slough is about three-



quarters of a mile; that from the tow head to the bluff on the Oregon side is a little over a half mile; from the tow head to Tenas Illihee Island more than half a mile; from the tow head to the range line is 110 fathoms; that he first saw the "Henderson" about abreast the point of the island passing the fisherman Charlie Johnson, and that at that time she was above the range lights. On page 457 he testifies that when the "Henderson" passed Eddie Grove she was a little below the tow head,—about sixty fathoms,—and on page 458 that the "Henderson" got back on the range lights about abreast of the tow head and that when he first saw the "Samson" the "Henderson" had just passed Eddie Grove. On page 459 he testifies that the "*Henderson*" *gave the first signal when she was a little above the tow head and was then on the range line; that at that time he saw the green light on the "Samson,"* also two head lights and lights on the barge, but *that he could not see the red light.* On page 460 he testifies he saw these lights at the time the "Henderson" gave the first signal. On page 462 he testifies that he *could not see the outline of the "Henderson" and oil barge* but could see the bright lights on the boats, and that when the second whistle was blown all that he could see were the lights, and that at that time he saw the bright lights on the "Samson," the green light and two head lights and one or two lights on the stone barges, but did not see the red light of the "Samson" at all. On page 463 he estimates that when the "Henderson" gave the second signal it was 300 fathoms away from him and that he did not notice the "Samson" answer this signal. On page 464 he says that at that time

the boats were half or three-quarters of a mile away from him. On page 465 he testifies that *when he went over to the "Henderson"* he passed the "Samson" and the "Samson" *was backing out of her scows from the "Henderson,"* and that the "Henderson" at that time was laying bottom side up and a *quarter of a mile above where she was the next morning.* On page 467 he testifies that a row boat came over from the "Samson" and got to the "Henderson" about the same time he reached the "Henderson," and that the "Samson," when she reached the "Henderson" put a line on her. On page 468 he testifies that the "Samson" was trying to pull her back into the channel. On page 469 he testifies that when he went over to the "Henderson" he passed below the "Samson" and saw all three rock barges, but one was a bit farther down than the others, and that he did not know whether this one was attached to the "Samson" or not, but that the other two farther up were attached. On page 470 he testifies that *at that time the "Samson" was about fifty feet from the "Henderson."* On page 471 he testifies that *he did not notice the lights on the rock barges* at that time and that he does not think the rock barges were anchored at that time. On page 472 he testifies that after getting the people from the "Henderson" on the "Samson" he went to lay out his net, but did not lay out his net because he concluded the rock barges were in his way and that at that time the rock barges were anchored and lying about seventy-five fathoms on the Oregon side of the range lights and that the next morning when he came to lay out his net the rock barges were gone.

## THE STORY OF THE OFFICERS AND CREW OF THE SAMSON AND KERN.

Charles Jordan, the pilot who had charge of the navigation of the "Samson" and her tows at the time of the collision, testifies that when he came on duty the night of the 21-22 July, 1911, he looked around at his vessel and her tows and that there was a white light on the bow of the port scow, a white light on the bow of the starboard scow, two white mast head lights, a red light on the port side of the "Samson," a green light on the starboard side of the "Samson" and a light aft on the "Samson" on the mainmast. (Record, pp. 589-590.) He testifies, page 592, that he saw the "Kern" almost continuously from the time he was between Pancake Point and Coffee Island until she went into Bugby Hole; that as she went around the point of Puget Island he lost sight of her and that he was then about half way between Pancake Point and Coffee Island; that he saw the "Kern" again after she rounded the lower point of Puget Island at Bugby Hole; that before rounding the point of Puget Island he gave one long blast of the whistle. On pages 593-594 he testifies that in rounding the point of Puget Island he had to haul well over to the starboard side of the channel going down, as there a fisherman who showed him a red light when he was abreast of Bugby Light; that he turned the point of the island close to the Puget Island side on a port helm. When he turned to the point of the Island he saw the lights of the "Kern" again and saw what afterwards proved to be the "M. F. Henderson" and Oil Barge No. 93; that he heard the passing signal exchanged between the "Henderson" and

“Kern” after he got in sight of them around the point of Puget Island and that, in his judgment, the “Kern” passed the “Henderson” and oil barge about the lower point of Puget Island where the Cathlamet Slough comes in. On pages 595-596 he describes his course, after he turned the point of Puget Island, as follows:

“A. Well, I told the man at the wheel to steer for the Upper Skamokawa light, as he always did, and then I had seen these boats coming, so I told him, as long as we was well over, we better hold up that way a little to steady her up there; so we steadied up, headed a little above Skamokawa upper light. Shortly after that the oil barge gave one whistle, so I told him to port; she was going down with the ebb tide, setting over all the time; and the oil barge didn't seem to change her course any, so I says ‘Port a little more, John.’ That fellow is steering bad, anyhow we will give him plenty of room, keep off going down. I could see both red and green lights. I said, ‘John, by Jingo, there is something wrong with that fellow. He don't seem to move at all. He holds right in the course; there is something wrong.’ I says, ‘Port again, she is coming.’ Shortly afterwards the oil barge blew another whistle and I answered and I said ‘Hard aport.’ John says ‘Hard aport now.’ I heard the bell ring, put my hand on the dial, saw she was hard over and the boat was swinging. I just let go the whistle cord; as I let go I happened to glance at the compass and saw she was headed around north half east. The boat was still swinging on the screw. Wasn't only a few seconds between the last whistle until the crash



came. I was well in towards the Puget Island side then, just a little below Mr. Ostervolt's seining house.

Q. Had you at that time gone down on the Hunting Island range lights?

A. No, sir, I never got onto the ranges at all.

Q. Did you observe those ranges that night?

A. Yes, sir.

Q. What was their condition as to being open or not?

A. *They were well open on the upper side. In fact I never get on the ranges until I get further down than where the collision took place that night. Never come on the range until I was further down than we were that night.*"

Record pages 597 to 599 he testifies that when the "Henderson" and her tow gave the first passing signal he thinks they were half a mile away; that he answered this signal immediately; that when the second passing signal was given he thinks the vessels were not more than 400 or 500 feet apart; that he answered this signal promptly; that at this time he saw both the red and green lights of the "Henderson" and her tow; that at this time his helm was hard aport, and as soon as he answered the signal he gave the signal to back; indeed, that he thinks he gave the signal to back before he answered the second signal; that at that time the reflection of the white lights from each of the barges—port and starboard—were visible; that at that time he thinks he was 700 or 800 feet off the Puget Island shore, a little below Mr. Ostervolt's seining house where he lives and just below Grove's Slough; that he could see up the Slough

and saw a scow house there tied to the bank. On page 601 he testifies that at the time of the collision he was 300 feet above the range line toward the Puget Island side. On page 602 he testifies that the port rock scow hit the off barge a glancing blow, forward and slid along the oil barge and hit the stem of the "Henderson," and that at about the same time she hit the stem of the "Henderson," *the middle rock scow struck the "Henderson" just under the forward port house*, and when the "Henderson" was struck by the center rock barge the bow of this barge was about 175 feet from where he stood. On page 603 he testifies that the "Henderson" was broken loose immediately; that the "Henderson" was backing; that she broke loose and went around the stern of the oil barge; that the oil barge kept on her way; *that about three minutes afterwards he heard the anchor chains go out*; and that *at that time the oil barge has passed him quite a way*. On page 604 he testifies that immediately after the collision he ordered the "boys" to get the boat over right away and to cut loose from the scows or anchor the scows. Some of the crew ran forward and anchored two of the scows; that he saw the man on the port barge and instead of anchoring the scow immediately he went forward and took a light, set that down and picked up the one that had been on the bow of his barge and went down to examine the scow; that at this time the lines of this barge were off; that the mate and two sailors got into a boat and went to the "Henderson"; that while alongside the two scows, some fishermen came out, and that he told him to hurry to the "Henderson"; that at this time he was lying on the starboard side and the pas-

sengers were on the guard or the scow; that he turned the searchlight on and saw the passengers there; that as soon as he got loose from the scows he went to the "Henderson"; that she was drifting toward Tenas Illihee Island; *that in going to the "Henderson" he noticed the range lights, and that he had to cross the range lights to get down to where the "Henderson" was*; that when he got to the "Henderson" he put a line on her, and that at that time she was a little below the ranges; that he put the head line on her and towed her toward Tenas Illihee Island; that he stood by the "Henderson" for about an hour and a half after she grounded to keep her on the beach so that when the tide fell she would stay; that he thinks after the collision took place, the "Henderson," between the towing and shoving of the "Samson" and her own drifting, went about two-thirds of the way across the river toward the Tenas Illihee side. On page 607 he testifies that after leaving the "Henderson" the next morning, they took the passengers up to the oil barge where she was anchored up under the bluff at Bugby; that they then went back and picked up the three rock barges,—picked up No. 9 first, which at that time was way down on the edge of the sand spit, the lower end of Puget Island well into the beach, in his judgment, not more than 150 or 200 feet from the beach; *that she was in shoal water and that they kicked up mud in getting her away*; that then he went up to the two barges anchored above and picked them up; that they were just abreast of the small slough at the lower end of the Ostervolt seining ground; that they were anchored, had lights burning and were between 300 and 400

feet off the beach on the Puget Island side; that at this time it was fairly light. On page 609 he testifies that when he went over to the oil barge *she was anchored*; that the anchors went out from forward and *that she tailed toward Clifton channel*,—right toward the Oregon shore off the beach probably 300 feet. This witness testifies that oil barge No. 91 and oil barge No. 93 are practically the same! that he landed one of these oil barges at the dock at Portsmouth; that *he stopped his boat half a mile from the landing place*; that he had had experience in towing sea-going vessels, and that in his judgment, if such a vessel as oil barge No. 93, moving at the rate of three or four miles an hour, were suddenly cut loose from the tug boat, she would drift at least a mile in still water and that *she would drift at least a quarter of a mile against such a current as prevailed in the Columbia river at the time and place of the collision*; that he does think that if the “Henderson” backed for a minute before the collision, the backing would have had little effect upon the momentum of the oil barge; that he was mate at one time upon the “Henderson” and acquainted with her; that in his judgment the *breaking of the lines* with which the “Henderson” was lashed to the oil barge would cause a slight jar and *would not retard the momentum of the oil barge appreciably*; and that, in his judgment, the *oil barge cut loose from the “Henderson” under the conditions which prevailed that night, would go a quarter of a mile*. On pages 619 and 620 he testifies that when he saw the oil barge the next morning after the accident some paint had been freshly rubbed off and that there was black and yellow paint



on barge No. 9 where she had struck the oil barge; that the next morning after the accident he examined the port scow, No. 9, and that it had a dent in the bow and some other injuries; that the middle scow, No. 27, had the deck torn loose from the stanchions and some of the rock were moved on the deck. On page 621 and following this witness' attention was called to libellant's Exhibit 1 and particularly to the several notations made on this exhibit by the witness Edward Sullivan, and testifies that if the oil barge was at the position shown on the chart by Captain Sullivan at the time when he first sighted the "Samson," *the only colored light on the "Samson" which would have been in sight would have been the green light*; that if the oil barge was in the position marked "X," which is the place at which she was located by Captain Sullivan at the time the first passing signal was given, the *only colored light* on the "Samson" which would have been *visible was the green light*; that if the oil barge had been at any of the positions marked by Captain Sullivan on the chart at which he testified she was at the time of the second whistle was given the *only colored light* from the "Samson" which would have been *visible* to the oil barge was *the green light*. On pages 625 and following this witness located on libellant's Exhibit 1 the place of the collision, the place where the two rock barges were anchored the next morning, the place where the "Henderson" was when he left her the next morning; and on the chart, claimant's Exhibit A, this witness, pages 626 the following, locates where the "Samson" was when he first saw the oil barge, where the oil barge was at the time when the

collision occurred, where the two rock barges were picked up the next morning, where the third rock barge was picked up the next morning, the Upper Skamokawa light and Bugby light. On page 628 he testifies that he did everything he could think of to avoid the collision, and on page 629 he testifies that if the port barge of the "Samson" so struck the "Henderson" as claimed by the libellant, it would have left nothing of the "Henderson." On pages 630 and following of the record the witness testifies that if the "Henderson" and her tow were run on the course indicated by Captain Sullivan between the point where he first saw the "Samson" and the point where the collision took place; and the "Samson" was running on the course pointed out by Captain Sullivan from the point where he locates the "Samson," to the point of collision, the only light of the "Samson" which would have been visible to the "Henderson" would have been the green light and the only light of the "Henderson" and the oil barge which would have been visible to the "Samson" would have been the red light; and that if the two vessels were running on these two courses as claimed by Captain Sullivan, in his judgment, the white light on the port barge of the "Samson's" tow would have been obscured by the rock on the center barge. On pages 633 and following, this witness testifies that if the oil barge and "Henderson" were at the place where he locates them when he first saw them, the "Samson" at the place where he first locates the "Samson" when he first saw the oil barge and the "Henderson" and they had pursued the courses which the witness testifies to, all the lights of

the oil barge and "Henderson" would have been in sight at all times, though the green light might have been shut out a part of the time when the vessels were about 100 feet apart. On pages 637 and following the witness testifies that he is acquainted with the manner in which towing is conducted on the Columbia river in going up and down the river around Puget Island; that *tow boats towing up stream usually keep toward the Puget Island side*; that he has *several times watched Captain Sullivan when he was towing along that Island and that he kept on the Puget Island side of the ranges*. On page 638 the witness testifies that he has several times been present when vessels like the "Samson" and "Kern" and other boats have hit barges, and that, in his judgment, the striking of the bow of barge No. 9 by the stem of the "Henderson" in the manner in which he describes, would possibly not have had much effect upon the stem iron.

### STORY OF HANS JENSEN.

The testimony of this witness is found in the record on pages 787 to 795. He was on duty as engineer at the time of the collision and in charge of the engine. He testifies, page 788, that at or just before the collision he got four gongs and one jingle, which means to run the boat from full speed ahead to full speed astern; that he felt the shock by the collision very slightly; that he obeyed the bells at once. On page 789 he testifies that while backing up he got a stop bell, and that he thinks about ten minutes thereafter he got another backing bell and that at this time some of the rock barges were alongside of the "Samson." On pages 790 to 791 he tes-

tifies that he saw the rock barges when they were picked up the next morning; that two of the barges were lashed together and were picked up last; that these he didn't pay any attention to and cannot locate, but the other barge which they picked up first was so far down that he could see Cathlamet looking up Cathlamet channel, and that it was about one barge length from the Puget Island shore. On page 792 he testifies that he went on duty that night at twelve o'clock and remained on duty until six in the morning when he was relieved by the chief engineer. On page 794 he testifies, on cross-examination, that he did not hear any of the whistles of the "Henderson" or the oil barge, but heard both signals from the "Samson."

Frank H. Goodell was the chief engineer upon the "Samson"; he went on duty at twelve o'clock, and at the time of the collision was in bed aft on the upper deck, the door of his room opening forward, swinging from the starboard side and the opening shuts out the view from the port side. He heard the bells on the "Samson" from full speed to full speed astern; *went out of his room facing the starboard side; saw the shore; located himself; started across the other way to look and saw the oil barge slide by.* (Transcript, p. 797.) He did not see the impact. He heard the two signals from the "Samson," but did not hear the signals from the "Henderson." He testifies that when he located himself, he thinks *he was about 300 feet from the Puget Island shore.* (Transcript, p. 798.) He locates the "Samson" at that time on the chart, claimant's Exhibit



B, as about opposite a small slough. (Transcript, p 799.) When the oil barge went by him he did not watch her farther, but went down to the engine room and then went on deck again and aided in casting off the starboard stern line which reached from the starboard corner of the starboard barge to the after starboard quarter of the "Samson." (Transcript, p. 801.) *He heard the rock barges anchored* and remembers the "Samson" backing out from them after they were anchored; *he did not hear any anchors on the oil barge.* (Transcript, p. 802.) He knows that the "Samson" put a line upon the "Henderson"; thinks that this was done ten minutes after the collision, and thinks that the "Samson" dragged the "Henderson" 600 or 700 feet. (Transcript, p. 804.) He testifies in regard to picking up the barges the next morning; No. 9, the port barge, was first picked up and he testifies that she was well down toward the sand bar at the foot of Puget Island and approximately 200 feet from the shore and was anchored. (Transcript, p. 805.) He also was present when the other two rock barges were picked up by the "Samson" and testifies that they were 600 or 700 feet above the one barge, probably 300 feet from the Puget Island shore and anchored a little below the mouth of a little slough around which he testifies the collision occurred. (Transcript, p. 806.) He examined the two rock barges the next morning and found No. 9—the port barge—not injured much, the guard around the nose turned up and broken somewhat. The middle barge, No. 27, had its bow stove in and the top hatch torn off. (Transcript, p. 808.) On page 811 he testifies further regarding the injuries to the port

barge and the center barge, and says he noticed black paint over the guard of the port barge where it was rolled up. He testifies that those injuries were not on the barges at the time when he examined them a few days before. On page 829 of the transcript he locates where the *oil barge was anchored* the next morning and testifies that she was *anchored right below the bluff tailing down toward the old fish trap into Prairie channel* and about 300 feet from the shore. On page 848 he testifies that he thinks the stone barges were anchored in five minutes and that the "Samson" was not manipulating them but drifting. On page 856 he testifies that when they *picked up the barges they were so close to shore that the propeller was digging up mud.*

Peter Lursted was a seaman on the "Samson." He was not on duty at the time of the collision; he was aroused by the trouble bell. He got on deck just at the time of the collision and was on the port side forward. When he came on deck the "Samson" with her barges seemed to be heading toward the Puget Island shore. He was one of the sailors who got into the boat and went over to the "Henderson." He didn't notice the range lights when he went over because he was pulling. This boat was the first boat to get to the "Henderson." He was on the "Samson" when she picked up the stone barges the next morning. He testifies in regard to picking up the barges. (Transcript, pp. 870 and following.) He testifies that they picked up the port barge first and it was about 200 feet from the shore and anchored. He testifies that the other barges were an-

chored; that they were picked up and were about the same distance from the Puget Island shore. He testifies, page 873, that all of the rock barges were near to the Washington shore when they were picked up. This witness testifies (Transcript, p. 875) that he had frequently steered the "Samson" and that their accustomed course when they get around Bugby Hole is to steer for Skamokawa light until they get the ranges in line; that in steering the "Samson" and her barges from Bugby Hole until they got to Skamokawa light they give her port helm.

Elmer Grunstad was pilot on the "Daniel Kern" on the evening of the collision and on duty on the "Daniel Kern" when she passed the "Henderson." He testifies, page 883, that they passed the "Henderson," as near as he could judge, down toward Cathlamet cut-off, a little above that slough,—what is called Cathlamet cut-off. This witness testifies (Transcript, p. 884) that he noticed the manner in which the "Henderson" and her tow was steering, that when he swung in on the ranges, her green light first disappeared and then showed in sight again, and that he got on the lower side of the ranges in order to get clear of her, and while he was getting off, the red light disappeared. The "Kern" passed the "Henderson" to starboard. This witness testifies that *he saw the lights of the "Samson" behind him all the way until he passed Bugby Hole and that the "Samson" was, in his judgment, between half a mile to one mile behind him, and that he noticed two white lights on the barges.* He testifies (Transcript, p. 893) that when you get to

Bugby Hole you carry a little port helm until you make the turn and until you get on the ranges, and on page 895 he testifies that he had not passed Cathlamet Slough when he met Sullivan. On page 897 he testifies that he passed Sullivan, he thinks, less than a quarter of a mile above Cathlamet Slough.

Thomas A. Parker testifies that at the time of the collision he was on the "Samson" on deck on the port side of the house. He testifies (Transcript, pp. 911 and following) that he saw the collision; that when he got on deck he saw the port rock barge strike the oil barge on the bluff of the bow and glance off and at the time the "Henderson's" lines parted and the port barge went down against the "Henderson." He testifies (Transcript, p. 912) that he saw *the oil barge* as soon as the collision took place, *go right along* and *that he heard one whistle from the "Samson" a few seconds before the collision which awakened him*; that he heard two backing bells from the "Samson," and as soon as he got dressed went for the life boat and went over to the "Henderson." On page 914 he testifies that the "Samson's" life boat was the first boat to reach the "Henderson," and that it was there at least a minute before any other boat arrived. On page 915 he testifies that after he had taken the men from the "Henderson" over to the "Samson" he went back and got a line on the "Henderson." On page 916 he testifies in regard to picking up the barges the next morning. He testifies that the lone barge was first picked up, that it was close down to the end of Puget Island and about 200 feet from the shore in shallow wa-



ter, and *that they stirred up mud when they got it.* He testifies that two barges were anchored together near the little slough approximately 200 feet from the Puget Island shore. (Transcript, p. 917.) On page 918 he testifies that he thinks the collision occurred out 500 feet from the Puget Island shore, pretty close to the place where the two barges were anchored, and on page 919 he testifies that the "Samson" and her barges at the time of the collision seemed to be pointed toward the lower end of Puget Island. On the same page he testifies that *he heard no orders given from the "Henderson" or the oil barge, and heard no anchors run out on the oil barge.* On page 920 he testifies to examining the rock barges; that he examined the rock barges at the time they got them from the "Hercules" and that the port barge at that time was in first-class condition. On page 921 he testifies that he examined the center barge, that he was informed the barge was leaking, and that he found her leaking pretty badly. On page 922 he testifies that when the barges were picked up there was a white light on the port side and a white light on the starboard side of each of the two outside barges. On pages 922-3 he testifies in regard to going alongside the oil barge in the morning and testifies that she was under the bluff, down below the bluff a little, *that her stern was swinging quite a ways down like as if she was going down Prairie Channel.* On page 923 he testifies that he noticed the Hunting Island Range lights when he went over to the "Henderson" in the life boat, and that when they got out the boat they were on the *upper side of the Puget Island*

*ranges, and that when they got to the "Henderson" in the life boat she was above the ranges.*

Fred Pederson was oiler and fireman upon the "Henderson" and was on duty at the time of the collision. He testifies (Transcript, pp. 1007 and following) that he was sitting in the doorway on the port side of the "Samson" and heard the "Henderson" whistle, and could not say whether it was the "Henderson" or the oil barge. He immediately went out on deck to see which boat was approaching, and as he stepped out he could not see, and walked up forward, and as he got over near the forward end of the house he saw two green lights and two objects. Pretty soon after they blew one long whistle to pass again and a few seconds after that the crash came. It looked to him that the "Henderson" and oil barge changed her course very rapidly and swung very rapidly to starboard and swung right into the ranges. He testifies that he heard the first signal from the "Henderson" answered by the "Samson," and that it was answered promptly; that he heard *the second signal* from the "Henderson" *answered by the "Samson,"* and that it was answered promptly. On page 1009 he testifies that he saw the port barge just graze the oil barge and strike the stem of the "Henderson" and the *middle barge mashed into the port side of the "Henderson";* that he *saw the oil barge after the crash, that she was broken loose and was going by the "Samson," seemingly rapidly;* that after the oil barge passed he watched the oil barge farther and *did not hear any anchors let go on the oil barge or any orders from the*

*"Henderson" or the oil barge to let go the anchors.* On page 1011 he testifies that after the collision he saw the *"Henderson"* until her lights went out; that at that time the *"Samson"* was anchoring her barges but that her engines were not working. He also testifies that he heard the stop and full speed astern bells on the *"Samson,"* and that the same were given before the second whistle was blown. On page 1012 he testifies that he saw the one rock barge picked up, that it was on the Puget Island side about 150 feet from the shore. This witness also testifies to examining the rock barges the next morning, and he produced a sketch which he had made himself showing the way the boats looked to him, (Transcript, p. 1016) which sketch was offered in evidence marked *"Claimant's Exhibit C."* On page 1021 this witness testifies that he heard the order *"hard aport"* given from the oil barge, that he heard it repeated, and that this order was given just after the collision. On page 1029 he testifies that this order sounded to him like it came from the after part of the oil barge.

Xenophon Merjano was the barge man on barge No. 9 at the time of the collision. He was on the barge at the time of the collision and asleep. He testifies (Transcript, p. 1052) that *he put the light on barge No. 9 the night of the collision on the port side and that it was carried on the barge at the time the collision occurred.* That he got up and *found his scow away from the other scows and from the "Samson" too;* that he took a light from the cabin and went forward; when he got forward he saw the bow was

smashed up; that he ran back, put that light on the bits (that is what they call the post they make fast the line on) and took the other light which he had for his side light; that at that time the barge was not anchored; he was adrift; he was afraid that there might be some other steamer passing which would strike him again; that *he took the side light and went down below to see if the water was coming in* and found the hole about 16 inches above the water line; that he examined the scow along and was drifting down the river all the time; that when he found his scow was all right he came up and was still drifting; then he dumped his anchor overboard and remained on that barge the balance of the night and was there when the barge was picked up the next morning. On page 1055 he says that he was about 180 feet from the shore on the starboard side going down the stream. This witness had been a seaman for sixteen years, and he testifies that he put out that light on the port side of his barge as soon as it became dark, as soon as the "Samson" put out her lights. On page 1055 he testifies that prior to the collision this barge was all right; the next morning he also noticed, besides the fact that the barge was broken some, black paint along from the bow aft for 15 or 20 feet, and that this paint was not on this barge before that night.

Captain Joseph O. Church was master of the "Samson" on the night of the collision, and was on duty at the time they changed tows with the "Hercules." He testifies on page 1070 that he noticed the lights on the barges at the time he picked them up that night and took



them from the "Hercules"; that *there was a white light on the port barge on the port side and a white light on the starboard barge on the starboard side*; that he was on duty for sometime after the barges were taken from the "Hercules" and could see that these lights were still burning on these barges so long as he was on duty. He testifies that he does not remember hearing any whistles from the "Samson," but remembers hearing some short whistles from the "Henderson" just as he woke up. He testifies (Transcript, p. 1071) that he saw that the life boat was lowered; that he gave orders to let go the lines from the barges and anchor the barges. He also testifies that he went over to the "Henderson" on the "Samson," and that at that time the crew and passengers were on board the "Samson"; that they got a line over the "Henderson" on the cavel and tried to shove her toward the shore some, but the line let go and they got another one and laid against her bow and kept working ahead and shoving her toward shore, holding her against the current. This witness had been master of the "Henderson" at one time for about two years, and had towed with her, towing oil barges at times of the Union Oil Company, barges of practicaly the same kind as oil barge No. 93. He testifies, page 1083 and following, that he had had experience in breaking lines between his tow and his towing vessel and that, in his judgment, *the breaking of the lines between the oil barge and the "Henderson" would not check the momentum of the oil barge a great deal, nor retard her speed more than a quarter of a mile an hour*. He also testifies, page 1085, that backing for not more *than a minute full speed astern of the "Hen-*

dereson" would not reduce the speed of the oil barge more than one quarter; that, in his judgment, if the "Henderson" was cut loose from the oil barge after having backed for not more than one minute full speed astern in the condition of the current and tide at the place of the collision, the oil barge would go about a quarter of a mile against the current, but if she turned and drifted across the current, she would go a great deal farther. He testifies, page 1088, that *he did not hear any anchors let go on the oil barge at all, nor hear any noise from the anchors*. On pages 1091 and following he testifies in regard to the rock barges when they were picked up the next morning after the collision; that they were anchored at the time; *one was just below the lower point of Puget Island, pretty close to the sand bar, close enough in so that when the tug went in along side it kicked up mud there*; that the other two were some distance—probably a quarter of a mile—along the island, and were about 200 feet of the Island; *that all of the barges were on the Puget Island side of the range lights and something like 600 feet above the ranges*. On page 1092 he testifies that he does not think that the "Samson" worked her steam at all after the collision or did anything to direct the course of the barges after the collision. On page 1093 he testifies that he noticed the condition of the rock barges the morning after the collision; he found that the port barge had been struck at the round of the port bow and also there was a notch a little off to the starboard of the port barge cut about eight inches deep by some sharp object that looked like the stem of a boat; that the center barge had two planks

broken, the nosing turned up and some rocks has been knocked loose and tipped over; that he also noticed black paint on the port bow. On page 1095 he testifies that as soon as he started to tow the barges, *the center barge commenced to leak and so they had to bulkhead it.* On pages 1114 and following the witness testifies in regard to the manner in which he is accustomed to steer the "Samson" in coming from Coffee Island along Puget Island and testifies that he aims to keep about 400 feet or 500 feet off the Puget Island shore until they get below lower Skamokawa light and then run for lower Skamokawa opening until they strike the Hunting Island Range lights, and marked on the chart, Libellant's Exhibit 1, the point on the Hunting Island range where he usually strikes the range light. On page 1125 this witness testifies that if the stem of the "Henderson" had struck the bow of barge No. 9 and made a cut in it, the cut being between six inches and two feet in depth, it would not dent the stem of the "Henderson" much.

A. Sass was the master of the steamer "Hercules" on the night of the collision and transferred the barges from the "Hercules" to the "Samson." He testifies (Transcript p. 1129) that *he examined the barges* which he took down from Fishers Landing on July 21 and that *they were in good condition when he transferred them to the "Samson";* that there were no breaks or cuts in them nor anything broken about them. He testifies that he *saw that the lights were put on the barges that night,*—one was put about twenty feet from the bow on

the port side of the port barge and one about the same distance from the bow on the starboard side of the starboard barge, and that these lights were on the barges and in good condition at the time he delivered these barges to the "Samson." On page 1130 he testifies that when he got these barges back from the "Samson" No. 27 and No. 9 were damaged some.

J. P. Copeland was the master of the Steamer "Daniel Kern" the evening of the collision. He had been master of the "Hercules," the "Samson," the "Daniel Kern," the "Diamond O," which towed the oil barge from the place of collision to Portland. He testifies that in going around Puget Island he usually keeps nearer the Washington or Puget Island side and aims to get on the range lights about opposite the trap, which is about half way between the two sloughs. His attention is called on page 1135 to Claimant's Exhibit A, a chart upon which he marks the sloughs "1" and "2" and testifies that the trap is just a little above the mouth of No. 2, that the trap extends out about 600 feet and that when you pass the trap you are about 200 feet from the ranges. On page 1137 he testifies that the "Samson" tows faster than the "Kern," gaining about an hour and a half to an hour and three-quarters in fifty miles. On page 1138 he testifies that he passed the "Hercules" and soon after passed the "Samson"; heard the signals between the "Samson" and the "Hercules" when they exchanged tows and that on an average it takes about ten minutes to exchange tows. On page 1145 he testifies that he met the "Samson" with her tows the morning



of July 22nd just above Astoria and noticed that the port bow of the port barge had its nose turned back or broken and that there was some black paint on it, and that on the port bow of the middle barge there was a hole over which there was a piece of canvas.

John Peterson was not called as a witness, but on stipulation between the parties, his testimony taken before the inspectors was read into the record. Before the inspectors he testified, record pages 1198 to 1225. He testifies on page 1199 that he was on the "Samson" at the time of the collision of the "Henderson" and the "Samson" on July 22, 1911, and was at the wheel; that he came on watch at twelve o'clock, and that when he came on watch *Jordan was on duty and in the pilot house, and that he remained in the pilot house all the time until after the collision* and gave him his orders as to what to do. On page 1200 he testifies that he is acquainted with Hunting Island, knows where Coffee Island is, where Tenas Illihee is, where Bugby Hole is, where Bugby light is, where Westport Slough is, and where the Westport light is. On page 1201 he testifies that when they got to the bend the *pilot told him to port his helm a little and he did so*, and that then he saw the mast head lights of a steamer and the pilot said to him, "I wonder which side he wants to take," and I said, "I don't know," and then in a little while the steamer gave one whistle and the pilot answered and ordered the helm aport; that at that time the wheel was a little to the port but it was not hard aport; that he put he wheel over and the pilot said "Have you got it over?" I an-

swered "yes" and just about that time the bell went off; that after the first signal was given and answered the pilot said, "He steers kind of bad"; then the steamer turned around and showed us a green light and that green light didn't shut out except for a minute, and the pilot said, "That looks kind of funny," and then that steamer blew another whistle and the pilot said, "Wheel over?" and I said, "Sure, the wheel is over," and then that green light again and that green light was not shut out before the accident, probably a few minutes, before he was on top of us; the green light was shut out when he was almost on top of us. On page 1203 he testifies that he *came around the Island close up to the Island*; that he did not see the "Kern" at that time but saw the boat which was coming; he saw this boat for probably a couple of minutes or three minutes before she whistled and after she whistled he put the wheel hard over. Before that time it was a little bit over but not hard over; that the pilot answered the whistle with one whistle; that probably within three minutes more or less she blew a second whistle. On page 1205 he testifies that when he first saw the barge he did not see anything more than the mast head lights and when he did see the side lights he saw the two—both red and green—and he saw both lights after he blew the first whistle and continued to see both lights until after the second whistle was blown and continued to see both lights until just before the collision when she shut out the green light, probably a few seconds before the collision. On page 1207 he testifies that in coming around the Island that night they were close into the Island and came around on a little port

helm and kept a little port helm all the time. On page 1208 he testifies that *he remembers that the second signal was also answered*; that he knows where the ranges are down there, the Hunting Island range, *and that they were above the ranges all the time*. After the accident he testifies, page 1210, that the pilot took charge of the wheel and that he did not notice after he left the wheel, as he went down below, first to let go the lines on the barges and then to lower the boats. On page 1212 he testifies that he remembers the "Samson" backed about the time of the accident; that he backed a minute or two minutes, he does not know how long, and was still backing when he went down below. On page 1214 this witness testifies that he was looking at the "Henderson" when she came right into them in the collision; *that the center barge struck the "Henderson" amidships*; that he could not say whether the port barge struck the "Henderson" or not, or whether the port barge struck the oil barge or not; that after the accident the oil barge went by them slowly. On page 1215 he testifies that he *did not hear any orders to drop the anchors*, but heard the order given by the captain of the "Samson" to drop the anchors on the rock barges. On page 1216 he testifies that in turning the Island they kept pretty close to the Puget Island shore, but cannot tell what distance he was from the shore, as he did not take much notice of the shore. On page 1217 he testifies that one of the barges, when picked up in the morning, was about a couple of hundred feet from the shore and a couple of them were a little more than that. On page 1218 he testifies that, so far as he could judge, the oil barge did not change

her course at all, because he saw the two lights right along almost. On page 1225 he testifies that the "Henderson" looked to him as though she came from the land.

## TESTIMONY OF THE OFFICERS AND CREW OF THE OIL BARGE AND "HENDERSON."

From the testimony of the several witnesses who were on the oil barge and "Henderson" on the night of the collision, it appears:

(1) That no sufficient lookout was kept either on the oil barge or the "Henderson." The boatswain, Martinson, on the oil barge, who was the lookout at the time, testifies, page 112, that he was keeping lookout and assisting the pilot. On page 119 he testifies that "Well, I had some kind of a lookout, but I had no responsibility in the lookout part, you know." Phil Crossen was the watchman on the "Henderson." His testimony is found on pages 1226 to 1247. He was in the galley when he heard the danger signals blown. He did not see the "Samson" until after the danger signal was given. (p. 1227-28.) Neither of these lookouts saw the white light on the port barge of the "Samson's" tow. Neither of them paid any attention to the lights. Crossen testifies (p. 1238) that he paid no attention to the Samson's lights; that the barge which struck the "Henderson" at the corner of the house had no light on it, but that there was a light on the barge beyond that. It is evident that the barge which he saw strike the house was the center barge and that he did not see the port barge



at all. Neither of these witnesses heard the second signal given on the "Henderson" answered by the "Samson," but the helmsman on the oil barge heard the answer.

(2) The cross-examination of Sullivan, pilot who had charge of the navigation of the oil barge and the "Henderson," clearly shows that he did not know where he was and that when he saw there was danger of a collision, he lost his head. He admits that in testifying before the inspectors when the whole situation was fresh in his mind, he placed his boat in the river farther from the point of collision than the point at which he placed the "Samson." He could not place the "Samson" farther up the river, for if he had it would have been behind the point of Puget Island and would not have been in sight. He, therefore, had to change his own location in the stream by bringing himself farther up the stream. The testimony shows that the red and green lights of the "Samson" were situated about sixteen feet apart and fitted in board screens. The only testimony as to the near point at which both lights could be seen simultaneously is that of Captain Church. (Transcript p. 1112). He testifies that *both lights could not have been seen from any point dead ahead of the "Samson" less than 400 distant from her stem*. The testimony shows that Captain Sullivan was familiar with the "Samson"; had been her master for year, and doubtless was familiar with those facts as testified to by Captain Church. At all events no attempt was made to contradict this testimony. The testimony of the witnesses, Sullivan, Martinson, Stayton and Kalberg, taken together is to the effect that

the "Henderson" and oil barge passed the "Daniel Kern" opposite the sand bar a little below the lower point of Puget Island; that soon after this the lights of some vessel came around the upper bend of Bugby Hole, which lights were recognized by Sullivan instantly to be those of the "Samson" and her tow. That thereupon an order was given to port the helm of the oil barge a little, swinging the "Henderson" and her tow from the upper side of the Hunting Island Range lights where they had been at the time of passing the "Kern" to the starboard side of these range lights until they were well below the ranges; that the helm of the oil barge was then steadied so that the vessel proceeded on a course about parallel with the range lights until the "Samson" was about half a mile away; that at this point the oil barge blew one whistle, which was answered by the "Samson"; that both the red and green lights on the "Samson" had been visible to Sullivan and to Stayton on the "Henderson" from the time that they first saw her come around the bend of Puget Island and remained so visible until just before the collision; that after the first signal the oil barge continued on the same course without changing her helm and the "Samson" apparently came straight on down the river without changing her course; that thereupon Sullivan said, "That man don't seem to alter his course; give him another whistle"; that thereupon another whistle was blown by the oil barge; that Sullivan and Stayton don't remember having heard any answer from the "Samson"; nor does Martinson or Crossen remember hearing this signal answered; that at the time of this signal, the "Samson"

was about 500 feet away; that then, Sullivan, fearing a collision, ordered the helm of the oil barge hard aport and then called up Stayton, the pilot on the "Henderson," to stop, port and back, and that within a minute later the collision occurred. This testimony cannot be correct, for if the "Samson" proceeded from where she is placed by Sullivan when he first saw her to the point of collision as located by Sullivan, without changing her course in this distance, her course was at such an angle that only the green light of the "Samson" would have been visible to those on the oil barge and "Henderson." However, this testimony is to the effect that during this time the course of the oil barge and "Henderson" was parallel with the range lights. Furthermore, had this course been pursued by the oil barge and "Henderson," the "Samson" must have passed entirely to the starboard and no collision could have occurred. It was not necessary for there to be a change in the colored lights on the "Samson" to enable those on the oil barge to tell whether any change was made in her course. The distance between the bright light on the starboard bow of the starboard barge of the "Samson's" tow and the masthead lights was at least 150 feet, and any one watching these lights with any care could have told whether any change was made in the course of the vessel upon which these lights were carried. These lights, indeed, may be said to have constituted a range line in themselves and would have clearly indicated the course pursued by the vessel, and especially any changes made in her course. It will readily be seen that in order to collide with the "Hender-

son" at the point indicated by the testimony for the libellant, the "Samson" must have steered directly for the high bluff above Bugby Hole.

(3) If the collision occurred, as claimed by the witnesses for the libellant, and the oil barge was anchored within less than 200 feet of the place of the collision and if a lifeboat were launched as soon as the oil barge came to anchor and such lifeboat put off at once toward the "Henderson," it is plain that the lifeboat must have been launched within a very short time after the collision occurred, and that when the lifeboat was 400 feet from the oil barge at anchor. The lifeboat, therefore, from the oil barge would have reached the "Henderson" long before a boat could have reached the "Henderson" from the tow head, for from the tow head the boat would have had to go up stream a distance of more than 2500 feet. The testimony shows that when the lifeboat from the oil barge reached the "Henderson" all the passengers had been rescued and the boats of the firshermen were on the ground. It is plain, therefore, that the oil barge must have drifted a considerable distance before it came to anchor, or the testimony of the witnesses in regard to the launching of the lifeboat for the relief of the passengers of the "Henderson" must be untrue.

(4) The testimony on behalf of the libellant shows that the "Henderson's" lights did not go out for several minutes after the collision. Sullivan testifies, page 145, that the "Henderson" drifted in the direction in which the channel runs but only lasted a few minutes until the lights went out and then he could not see her any more.



(5) It appears, therefore, that either the oil barge drifted for two to five minutes after the collision or that the lights of the "Henderson" went out before the oil barge came to anchor.

(6) The navigation of the oil barge and "Henderson" by Captain Sullivan, assuming the facts to have been as he and the witnesses on behalf of the libellant testified, was in direct violation of the rules of navigation. The rules of navigation provide that "if, when steam vessels are approaching each other, either vessel fails to understand the intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short rapid blasts, not less than four, of the steam whistle." The rules further provide that when the danger signal is given the vessel must stop and back. In other words, that everything must be done by each vessel to avoid a collision. It is not denied that Captain Sullivan said, "That man don't seem to alter his course; give him another whistle." It is claimed on the part of these witnesses for the libellant that they could observe no change in the course of the "Samson," but that she seemingly maintained the same course at all times. It is admitted by all parties that the signal had been given by the oil barge to pass to port and that this signal had been answered. When these signals were exchanged it was the duty of each vessel to so change its course as to pass safely to port. It is not claimed that the oil barge changed her course after this signal until after the second signal was given. It is not claimed on behalf of the libellant that the "Samson" changed her course at all. The two vessels, there-

fore, must have been approaching each other at an angle or they could not have collided; or, if they were not approaching at an angle, then neither of them changed its course and they were approaching head-on. In either case it is evident that no intelligent pilot could have understood the course of the "Samson" and her tow, for it was the duty of the "Samson" to have changed its course, and if it did not change its course, then it is evident that its course or intention was not understood by those on the vessel approaching. Therefore, when the oil barge gave the second signal, it is clear, according to the evidence on the part of the libellant, that the "Samson's" course was not understood by those in charge of the oil barge and "Henderson," and the giving of the second signal was, therefore, a violation of the rules of navigation. Particularly would this be true, when, as testified by these same witnesses, they claim that they were running so near the Oregon shore that there was imminent danger of running aground upon that shore. To illustrate this point, your Honor's attention is called to Diagram No. 1 drawn to a scale, libellant's Exhibits 1 and 2, and claimant's exhibits A and B.

### TESTIMONY OF THE FISHERMEN.

The testimony of the fishermen who were called as witnesses in this case sustains, in part, the contention of the libellant and contradicts, in part, the testimony of the officers and crew of the oil barge and "Henderson," and these witnesses contradict one another.

Charles Johnson, the first of these fishermen, who was passed by the "Henderson," says that the "Daniel Kern" passed 25 or 30 minutes ahead of the "Henderson"; if so, she could not have met the "Henderson" at or near the sand bar, for she passed Johnson while he was on the tow head and he did not begin to lay out his net until after she passed. He testifies that it would take five minutes for him to get from the tow head to the place where he laid out his net and seven minutes to lay out his net and twenty minutes to drift to the point where he was at the time that the oil barge and "Henderson" passed him which was about at the sand bar just below the lower point of Puget Island. It is clear that Johnson was merely guessing at the time, for more than forty minutes had elapsed between the time that the "Kern" passed him on the tow head, as he testifies, and the time that he reached the place where he passed the "Henderson." It is significant that this witness did not hear any of the passing signals exchanged between the oil barge and the "Samson." He apparently paid no attention to the collision at all, though he says he heard the trouble whistle. Eddie Grove, whose fishing turn came next to that of Johnson, and who, with Loaland, was fishing, claims that he was passed by the "Henderson" to the starboard just below the tow head and that when the collision took place he had reached the sand bar. (Transcript p. 292). He says he heard the passing signals, but states that he did not hear the second signal given by the oil barge answered. He testifies that as soon as the oil barge passed him he saw the "Samson." He does not define

with accuracy the time at which these passing signals were given. The testimony of this witness is most improbable. He claims to have been watching the "Henderson" and oil barge because it seemed to be going close to the Oregon shore; that he heard the passing signals, the crash and the anchor chains going out at once, or practically at once, yet he had passed the "Henderson" and oil barge and there was no reason for him to watch this craft, for he was in no danger of being run into by it. He might expect a steamer coming up the river to endanger his net or his boat or both, and it was his duty to keep a lookout for boats coming up the river, as he claims that he, in his boat, was on the ranges at that time; in other words, in the center of the channel. The fact that he claims that he was watching the oil barge and "Henderson" is unnatural and the fact that he could not tell what lights the "Henderson" and oil barge showed or what lights the "Samson" showed and did not watch the "Samson" and her tow, which he must have known would come down the channel before he could get back to the tow head is again unnatural, and it is incredible that he should have been watching the oil barge and "Henderson" instead of the "Samson" and her tow. He claims that when he left the "Henderson" he laid out his net for another drift and found two rock barges anchored on the Oregon side of the range lights and in his way; that he passed near to them and yet he could not swear that he saw any light upon either of these barges. He also claims that he passed near the third barge anchored down near the sand bar, but was unable to say whether that barge carried any light. He



claims that when the collision occurred he was three-quarters of a mile away (the chart shows that he was even farther) and yet he claims that at that time he saw the spars and mast of the oil barge, and yet the witnesses on behalf of the libellant, who were on the oil barge and "*Henderson*," claim that the night was so dark that they could *not see the shore on either side*, and therefore could not locate themselves accurately in the stream. One witness, Stayton, testifies that it *was so dark*, that he, *in the pilot house of the "Henderson," could not see Sullivan on the bow of the oil barge, not more than 190 feet away from him.* (Transcript pp. 505-6). Loaland was in the same boat with Eddie Grove. His testimony does not differ from that of Eddie Grove, except in small details of time and place. Ole Grove and Dahl were in the same boat. They do not claim to have noticed the "*Henderson's*" course. They contradict the testimony of the officers and crew of the oil barge and "*Henderson*" in this that they testify *that the first signal was given just as the "Henderson" passed the tow head.* They differ between themselves in that Ole Grove testifies that they took three passengers from the "*Henderson*," whereas Dahl testifies that they did not take any passengers from the "*Henderson*." *Ole Grove testifies that he saw the green lights on the "Samson" at the time the first passing signal was given and saw no other colored light; indeed, that he never saw the "Samson's" red light at all.* Dahl, on the other hand, testifies that *he saw the "Samson" from the tow head* and that at the time he first saw the "*Samson*," the "*Hen-*

derson" was about abreast from the lower end of Puget Island and that *he never saw any colored light on the "Samson" except the red light.* (Transcript pp. 366-7). He repeats again, on page 383, that he saw *the red light of the "Samson" and not the green light* and that he was with Ole Grove at this time. These two witnesses, Ole Grove and Dahl were over to the "Henderson" and aided in taking off the passengers. They claim that they saw the rock barges in their way and therefore did not lay out their nets again that night, but they went home and had breakfast and came out again. Charles Johnson also claims that he saw these stone barges anchored on the Oregon side of the ranges the next morning, and yet he admits that he did not come out until seven o'clock. The log of the "Samson" introduced in evidence by the libellant (transcript p. 943) shows that the "Samson" began picking up the rock tow at 4:20, that the tow was made up and under way at 5:40. This record was kept moreover by the witness Jensen who went off duty at six o'clock and at that hour was succeeded by Goodell. It is manifest from an examination of the evidence of these witnesses that the fishermen really knew nothing about the collision at all. There was no reason for any of them to watch the oil barge and "Henderson," and every reason why they should watch the "Samson" and her tow. The oil barge and "Henderson" were not in their way; the "Samson" and her tow, they claim, were in their way. None of these witnesses was within half a mile of the place where the collision took place, and it would have been impossible for any of them to have seen anything that oc-

curred. They themselves testify that when they first saw the "Henderson" she had drifted off and above the point of Tenas Illihee Island. They had all talked with Captain Shaver, the principal officer of the libellant. They are all apparently ignorant men and paid little attention to what occurred around them. They were evidently intent upon their own pursuits. It is probable that they heard the whistles, it is also probable that they went to the "Henderson," but none of them went to the "Henderson" until he had finished his drift. It is improbable that they paid any attention to the "Samson" and her tow. Before passing from the testimony of these witnesses, the fishermen, some comment should probably be made upon their testimony regarding the currents. On the part of the libellant it is claimed that there is no current setting toward Prairie or Clifton Channel, but that the current sets from Bugby Hole down the main ship channel toward the lower end of Puget Island. It is true that the witness Sullivan admits there is some current down Prairie Channel (transcript p. 204) and Moran admits (transcript p. 1179) that there is some current from the old mill point down Prairie Channel. Shaver also admits (transcript p. 133) that some current goes down Prairie Channel, but all of these witnesses testify that most of the current goes down the ship channel. Ole Grove (transcript p. 427), Eddie Grove (transcript p. 323), Loaland, (transcript p. 339), and Johnson (transcript p. 390), all testify that the current sets down the ship channel toward the lower end of Puget Island. On the other hand, Church (transcript p. 1095), Jordan (transcript p. 609), Cope-

land (transcript p. 1134) and Grunstad (transcript p. 888), who have been masters of long experience on steam boats on the waters of the Columbia River, testify that the *current tends toward the point of Tenas Illihee Island and that there is a strong suction toward Prairie Channel*. Their testimony is corroborated by the testimony of other witnesses for the claimant. The fishermen base their testimony upon the fact that their nets, which are 45 feet deep, are put out less than 900 feet from the center of the channel and drift from that point down the ship channel. These nets are all weighted and they are put out from the Oregon side at a distance commencing probably 1000 feet from the Oregon shore. The other end of the net is carried toward the range line and when the cast reaches the range line the Oregon end of the net is about parallel with the end carried by the boat. These are the only facts upon which these witnesses testify regarding the trend of the current. As the water going into Prairie Channel is less than 20 feet deep, it is evident that there would be no tendency for the net weighted at the bottom to go into a channel less than 20 feet deep when the bottom of the net was 45 feet beneath the surface. Certain circumstances, however, clearly indicate that the testimony of the masters is correct. These circumstances are so convincing that your Honor's attention will be called to few of these circumstances:

(1) It is admitted that the oil barge anchored between 200 and 300 feet from the Oregon shore, and that, when anchored, she *tailed down Prairie Channel*. Many witnesses testify to this fact and no witness contradicts



it. Now, of course, the anchors being on the bow the trend of the vessel is down with the current and yet this barge was anchored from 200 to 300 feet from the Oregon shore in water 40 feet or more in depth.

(2) It is admitted by the fishermen and by all of them that along the upper part of Puget Island from the point where Grove Slough comes into the river to the point just above the next slough, the water is shallow. Here is also the Ostervolt seining ground. If the current were on that side of the river the water would not be shallow there, but would be deep if the reasoning of the witnesses for the libellant be applied, for they claim that the reason the current sets down the channel is because the water is deepest there.

(3) It is admitted by the fishermen and by all of them that toward the lower end of Puget Island there are snags which interfere with net fishing. Such snags are not found on the Tenas Illihee side. It is well known that snags are not found in a strong current but are found in the eddies and in shallow water.

(4) It is admitted by all of the witnesses that just below the lower end of Puget Island a sand bar has formed of later years and that this sand bar would not form in the stronger current, but the sand would be deposited where the current was less swift.

(5) The course of the river is a conclusive answer to this contention. The channel of the river comes along close to Puget Island between the upper point and the point where the island turns opposite Bugby Hole. The ship channel indeed runs between

Coffee Island and Puget Island and the deep channel runs into Bugby Hole and strikes against the Oregon shore where there is a high bluff, estimated by some of the witnesses at 1000 feet in height. This bluff is a rounding bluff toward the river and the water naturally striking the rounding bluff would round off from the bluff. From the bluff, therefore, it would flow directly toward the upper point of Tenas Illihee Island.

### THE DRIFTING OF THE VESSELS AND THEIR LOCATIONS.

The witnesses for the libellant, Eddie Grove, page 293; Loaland, page, 337; Ole Grove, page 426; Dahl, page, 376, and Johnson, page 410, locate the two rock barges Nos. 27 and 8 as near the range line and on the Oregon side just below the tow head; the other rock barge they locate as on the Washington side of the range line and about abreast of Cathlamet Slough. Eddie Grove, page 295; Loaland, page 339; Ole Grove, page 474; Johnson, page 412. Ole Grove did not see the barges by day light as they were gone when he came out in the morning; Johnson could not have seen them by day light as the barges, according to the log introduced in evidence by the libellant, were under way at 5:40; Dahl does not claim to have seen them in the morning, as he was with Ole Grove; Eddie Grove and Loaland saw them from the tow head in the morning, so that the barges nearest to them were at that time about 900 feet distant, and it would have been impossible for them to say on which side of the range line the barges were, looking across the range line at the barges.

The witnesses for the claimant, on the other hand, who locate the barges when they were picked up the next morning, are Jordan, Jensen, Goodell, Parker, Pederson, Peterson, Merjano and Church. They all locate the one barge as between 150 and 300 feet from the Washington shore off the upper end of the sand bar, and several of the witnesses testify that it was so near the shore that in *taking this barge away the "Samson" kicked up the mud in the bottom of the river*. The other two barges they locate as between 200 and 500 feet from the Washington shore at a point varying between the little slough above the tow head and the point just below the tow head. Sullivan himself testifies that as he looked at the rock barges from the oil barge he placed them on the Washington side of the range line. Suffice it to say that the witnesses for the libellant who testify in regard to the location of the rock barges seemingly overlooked the lights of these barges, for *none of them say that they saw any lights on them* even when they were anchored. Furthermore, the witnesses for the libellant testify that when they went from the tow head to the "Henderson" they went below the two rock barges and that they were going up stream, so that their testimony shows pretty conclusively that the rock barges did not drift as far down the river as the tow head. The evidence on behalf of the claimant in regard to the location where the rock barges were picked up is overwhelming, and especially so as the testimony of these witnesses relates to the picking up of the rock barges at the time when it was daylight, so that the location of the barges could be better ascertained. It may be conceded in regard

to the drifting of the rock barges that the two rock barges, Nos. 27 and 8, were attached to the "Samson" until they were anchored; that the drifting of these two rock barges may have been affected in some degree by the "Samson" itself, though the evidence shows that the "Samson" was not working any steam. The location therefore of these two barges is not conclusive as to the place of collision, but the location where the other barge, No. 9, when at anchor is conclusive, for the evidence shows that she was cut loose absolutely from the "Samson" and drifted down stream without any motive power and without any steering gear.

Turning now to the "Henderson," the witnesses for the libellant above mentioned when the first went to the "Henderson" place the "Henderson" as drifting above the point of Tenas Illihee Island. The evidence shows that she was cut loose absolutely from the oil barge and drifted behind the oil barge as the oil barge passed her. The evidence shows that the "Samson" pulled and pushed the "Henderson" for a period of more than an hour. Witnesses for the libellant claim that she was pulling the "Henderson" into the channel, which, of course, is absurd; whereas, the witnesses for the "Samson" claim that she was holding the "Henderson" so as to have her finally rest upon the sands off Tenas Illihee Island. Only one witness estimates how much this action of the "Samson" upon the "Henderson" amounted to. He says, that in his judgment, the "Henderson" was pushed and pulled toward the Tenas Illihee Island by the "Samson" fully 600 or 700 feet. The evidence shows that the oil barge was cut loose entirely from the



"Henderson," had no motive power of its own and when cut loose drifted with a hard aport helm and came to anchor about 300 feet from the Oregon shore. The witnesses for the claimant who examined her when they took the passengers over to her the next morning testify that she was anchored from the forward part of the vessel and was tailing down the Oregon shore toward Prairie Channel. There is no evidence which contradicts this statement in regard to her location and the direction in which she was tailing. If, therefore, the collision occurred where the libellant claims, and the oil barge did not drift more than 300 feet before she came to anchor, it is evident that the current at the point where she came to anchor was setting down toward Prairie Channel and that the "Henderson" would have drifted in a somewhat similar direction had it not been for the fact that the "Samson" had lines on her. Again, if the collision occurred as claimed by the libellant, it is evident that barge No. 9 would have drifted practically in the same direction in which the "Henderson" drifted and she would have brought up also on the shoals of Tenas Il-  
lihee Island.

Returning to the drifting of the oil barge, witnesses for the claimant, Jordan, pages 611 to 617; Grunstad, page 905; Church, pages 1082 to 1085; Copeland, pages 1146 to 1151, all of them masters of vessels on the Columbia River and familiar with towing, and some of them having handled the "Henderson" and being familiar with her backing capacity and all of them familiar with the oil barge and vessels of like craft and tonnage, testify that under the circumstances disclosed by the

evidence; that is to say, the oil barge going at the rate of three to four miles an hour and lashed to the "Henderson" as shown by the evidence; the "Henderson" backing for not more than one minute before the collision; the oil barge suddenly cut loose from the "Henderson" by the collision; the current and tide as at the place of collision; testify that the oil barge would have drifted toward the Oregon shore for a distance of from one-quarter to one-half a mile. All of the witnesses were examined in regard to the effect of the anchors, if the anchors were let go on the oil barge just after the collision, and they all testify that in their judgment the oil barge would have drifted at least 1000 feet, and some of them as much as a quarter of a mile.

Crowe, an old seaman, familiar with sailing vessels and the momentum of such vessels and also familiar with the anchorage and current at the place and time of the collision, having put before him the manner in which the "Henderson" and oil barge were moving, the manner in which they were lashed together and the fact that the "Henderson" backed for not more than a minute before the collision, testifies that, in his judgment, the oil barge would have drifted a quarter of a mile and practically toward the point where she was found at anchor. He testifies that, assuming the anchors were dropped as claimed by libellant and that they were of the weight claimed by the libellant, the oil barge would have drifted at least her length and a half, so that she would have drifted at least 500 feet.

## THE TESTIMONY FOR LIBELLANT IS CONFLICTING.

This conflict is not so much the usual one of statement and contradiction; in fact, the story told by the libellant's witnesses is fairly consistent in outline. Captain Sullivan, indeed, has testified that he, whose business it was to listen for an answer to his second whistle, does not remember having heard such an answer (Transcript of Evidence, Page 38), and Kalberg, the quartermaster at the wheel of the oil barge under Captain Sullivan, has testified positively that he does remember that the "Samson" answered the second whistle from the oil barge. Captain Sullivan also varies considerably in his testimony with regard to the respective positions of the oil barge and the "Samson" (Transcript of Evidence, Diagram No. 2); in fact he admits that his change in his location of the oil barge and the "Henderson" at the time when he first sighted the "Samson" (from A' to A on Diagram No. 2) was caused by his discovering, after making the A' location, that the oil barge and the "Henderson," traveling at the speed they were making at the time, could never have reached the point where he testified the collision occurred in time to intercept the faster-traveling "Samson." In other words, Captain Sullivan's testimony displays a peculiar flexibility with regard to his various positions on the chart. Captain Sullivan also gives his opinion that, "There were not more than thirty seconds, or, at the outside, forty seconds, between the time of the crash, the two boats colliding, and these anchors were on the bottom"; yet he con-

firms as correct his testimony given at the previous trial of Captain Jordan, as follows:

“Q. How long after the collision before your barge came to anchor so that it was safe, and you could look around? A. Oh, I think it was perhaps in the neighborhood of five minutes. I should deem it was.” Libellant’s witness, Martinson, in his deposition before the United States Commission for the District of Oregon, testifies that Captain Sullivan gave orders to the man at the wheel of the oil barge to port his helm only once, when the first whistle was blown from the oil barge, but in his testimony before the court the same witness testifies that another order to port the helm was given after the second whistle.

It may perhaps be objected that the above are unessential inconsistencies; but a better estimate of the truth of libellant’s version can be gained, as is often the case, from an indirect, rather than a direct, treatment of the testimony. For instance, in telling the story of the accident, Captain Sullivan testified as follows: “The ‘Samson’ came on past the bow and I saw that the barge would clear, but she was going to catch the ‘Henderson’ with her tow.” Obviously, if the “Samson” were bearing down upon the “Henderson” and the oil barge very nearly at right angles, while the oil barge was swinging off the starboard, headed into the Oregon shore, according to libellant’s version, there would be no question of the oil barge’s “clearing” the “Samson” and her tow—unless, of course, Captain Sullivan might have meant that he saw that the oil barge would succeed in getting across the bow of the “spiked tow” before being hit. Consider-



ing, however, that the "Henderson" was struck at a point about thirty-five feet aft of her stern, which, as about one hundred feet of the "Henderson's" length lay along side the oil barge, would be about sixty-five feet forward of the stern of the oil barge, this interpretation of Captain Sullivan's words can hardly be accepted. The oil barge did not "clear"; consequently Captain Sullivan could not have seen that she was going to "clear." In fact the only possible interpretation of this testimony is that the vessels were actually approaching almost head-on, as alleged by claimant. In that case, and in that case alone, would Captain Sullivan have seen "That the barge would clear, but she (the 'Samson') was going to catch the 'Henderson' with her tow."

A glance at Diagram No. 2, or at Libellant's Exhibit 1, from which the diagram was traced, shows that the oil barge and the "Samson" were running on courses at a considerable angle to each other, which angle, according to testimony for libellant, was considerably increased just before the collision by putting the helm of the oil barge hard aport. Yet Captain Sullivan, on cross examination, has testified as follows:

Q. You were running at angles, weren't you?

A. Yes, but we were running also at a point where she was intercepting our course.

Q. I say, you were running at an angle with her, weren't you?

A. Yes, that is what I claim.

Q. I want to know how you could see her red lights when you were running at an angle with her, and she was running with her starboard side towards you?

*A. I claim she was running directly towards me or there couldn't have been a collision.*

*Q. Could she have run directly towards you if she had run from the point where you placed her when the second signal was given to the point of collision?*

*A. I think so.*

*Q. And you put your helm hard aport, too?*

*A. She was going all the time, and we, of course, didn't get much out of her way. We didn't move out of the track far enough that she didn't hit us, so we couldn't have been running at angle away from her."*

If this testimony means anything, it means that the vessels met in practically a head-on collision. The confusion and contradiction in Captain Sullivan's testimony result from his trying to support his story of the accident by means of observations made under circumstances quite inconsistent with such a story.

Again, libellant's witness Martinson, the boatswain of the oil barge, who was standing on the forecastle head behind Captain Sullivan just prior to the collision, has testified that at the time he left the forecastle head and went down to the main deck, after Captain Sullivan had given the order to the "Henderson" to port and back, *none of the scows of the "Samson's" tow had passed him.* As in the case of Captain Sullivan's examination, *supra*, this testimony is meaningless if the "Samson" and her tow were, as claimed by libellant, coming at almost right angles to the rapidly veering course of the oil barge. When Martinson went down to the main deck the "Henderson" was blowing danger signals; this was a second

or so before the collision occurred; therefore, there cannot have been any material change in the respective positions of the "Samson" and the "Henderson" between the time when Martinson left the forecastle head and the time of the collision. It is obvious that if the "Samson" and her scows were bearing down upon the "Henderson" and the oil barge in such a manner as within a few seconds to strike the "Henderson," at practically right angles, at a point about sixty-five feet from the stern of the oil barge there could be no question as to whether or not the "Samson" and her tow had "passed" the witness, who was standing with Captain Sullivan about twenty-five feet from the bow of the oil barge. On the contrary, if such had been the respective positions of the "Samson" and the "Henderson," the "Samson" and her tow must have been considerably astern of where Martinson and Captain Sullivan were standing; for the "Henderson" was hit about thirty-five feet from her stem, which would be about sixty-five feet forward of the stern of the oil barge, as above stated, and this again, the length of the oil barge being two hundred and eighty feet, would be about one hundred and ninety feet aft of where Martinson and Captain Sullivan were standing. Consequently this testimony of Martinson's, like Captain Sullivan's, plainly shows that the real conditions at the time he made his observations were quite other than those libellant has attempted to establish. The scows and the "Samson" were evidently coming almost head-on and were about to sweep past the side of the oil barge and strike the "Henderson;" but at the time Martinson left the forecastle head, thinking there

would be a collision, they had not yet "passed" the place where he was standing on the forecastle head. As the testimony shows that the oil barge was going about four miles an hour and the "Samson" about seven, it is easily seen that the combined speeds would make the traversing of the two hundred odd feet from the bow of the oil barge to the point of collision on the "Henderson" a matter of only a few seconds. This is in exact agreement with the rest of Martinson's testimony; and in fact only libellant's version of the accident can harmonize his testimony and make it intelligible.

Libellant's witness, Phil Crossen, in his testimony taken before the inspectors at the trial of Captain Jordan, stipulated to be copied into the record of this case, testifies positively that he saw the port scow strike the "Henderson," and that it did not strike the oil barge. This, as Crossen was standing right at the bow of the "Henderson" at the time of the collision, would at first sight seem to be very strong evidence in support of libellant's contention; but on further examination it, like the evidence of Captain Sullivan and of Martinson, becomes instead a refutation of such contention, and this is shown by the strongest kind of "internal evidence." Crossen, it seems, was standing behind and to port of a tank on the foreward deck of the "Henderson." This tank was from four to four and a half feet high and from twelve to fifteen feet from the "Henderson's" stem. Crossen saw only two scows. The scow which hit the "Henderson" was, so far as can be made out from the witnesses' confused answers, the one which seemed to him to be the furthest in front; and it had no light on



it, whereas the scow next to it—the one furthest away from the witness—had. Both Captain Jordan and claimant's witness Merjano, the man in charge of the port scow, number 9, testified positively that that scow carried a white light on her port bow. In view of this latter testimony Crossen's account of the collision seems impossible to explain. If it were the port scow which hit the "Henderson" Crossen should have seen the light that scow carried; and it is inconceivable how the bow of the port scow, which the testimony shows was fifty feet aft of the bow of the center scow, could have appeared to him to be the furthest in front. If, however, claimant's version of the collision be accepted, Crossen's testimony becomes at once reasonable and convincing. He saw no light on the scow which hit the "Henderson" because there was none; and he saw a light on the scow furthest from him because that scow, being the starboard member of the "Samson's" tow, carried a light on her bow. He saw no light on the scow which hit the "Henderson" because it appeared to be the furthest in front because it was so; and Crossen did not see the port scow because he was behind the tank and was engaged in watching the other scows. Crossen also testifies that he thought the scows were going to pass, an opinion he could hardly have formed had they been coming at practically right angles; and the fact he saw only two scows is strong corroboration of claimant's contention that the port scow being hidden from him by the tank, there were only two scows for him to see. The confusion and many contradictions in the testimony of this particular witness are, as in the instances of Captain Sullivan and of Martinson, easily

accounted for by the fact that he, like Captain Sullivan and Martinson, was trying both to record his actual observations and to explain them according to libellant's theory of the collision.

**THE UNDISPUTED EVIDENCE CLEARLY  
SHOWS THAT CLAIMANT'S VERSION  
IS THE ONLY POSSIBLE ONE.**

It is undisputed that after the collision the port bow of the port scow was slightly injured, that there was a cut in her starboard bow, and that the bow of the center scow was broken in and her forward deck scarred (Transcript of Evidence, pp. 811 and 1145 and 902); that there was black paint all along the port side and on the towing post of the port scow (set 15 or 20 feet from the stern), which had not been there before (Transcript of Evidence, pp. 768-769, 786, 1056 and 1145); and there is also some testimony that there was yellow paint on the scow as well (Transcript of Evidence, pp. 769-770), and that some paint was rubbed off the oil barge, on her port quarter, for about fifteen feet, at a point from fifty to sixty feet from her stern (Transcript of Evidence, pp. 555-556). There is indeed contradictory evidence regarding the yellow paint, and the witness Kness who testified to the scratch on the port quarter of the oil barge has also testified that the guard of the "Henderson" would have rubbed the oil barge at that place; but it certainly appears, both from the testimony and from the photographs of the wrecked "Henderson," which libellant has introduced in evidence, that this black paint could not have come from the "Henderson." No

explanation for its presence can be given under libellant's version of the accident. If the port scow struck the "Henderson" about thirty-five feet from her stem, and the oil barge was at that time swinging off to starboard, it is impossible that the port scow could have become streaked with black paint from the oil barge all along her port side. As to the cut in the port scow's starboard bow, the testimony is about evenly balanced, libellant's witnesses maintaining that if it had been caused by the stem of the "Henderson" the shock would have materially injured the stem-iron and damaged the hull of the latter, while claimant's witnesses contend the opposite. No explanation of the cut is, however, offered by libellant's witnesses except the surmise of Captain Shaver, the owner of the "Henderson" (Transcript of Evidence, p. 1346), as to the "Henderson's" "doctor pump." This was a cast iron pump weighing about a couple of tons, situated in the "Henderson" just about where the boat was struck; its frame was square, with sharp square corners, and part of it was driven across the ship and under the boiler by the force of the collision. Captain Shaver bases his guess upon information to the effect that the cut in the scow was square and sharp, whereas the stem-iron of the "Henderson" had rounded corners; but Captain Shaver never saw the cut in the scow; and the suggestion of the "doctor pump" is simply his contribution towards trying to fit the facts of libellant's theory of the collision. But it is entitled to no more consideration than any other speculative hypothesis, and on closer scrutiny, it is submitted, becomes untenable; for if the port scow struck the "Henderson"

at an angle sufficiently obtuse for the corner of the "doctor pump" to make a cut in the *starboard bow* of the scow, and beginning at a point only thirty-five feet from the "Henderson's" stem, it is impossible that the remaining one hundred and nine feet of the "Henderson's" length (deducting 36 feet for the beam of the scow, and the "Henderson, being 180 feet long, including her wheel) could have escaped prior injury by the center scow which projected fifty feet ahead of the port one. A glance at Diagram No. 3, drawn to scale according to the evidence, will show, by the line XY, that the port scow could not possibly have struck any straight edged project, such as the side of the "Henderson" with her *starboard bow* unless the center scow struck it too, and that within about eighty feet from where the port scow struck. The only possible explanation of this cut in the port scow and of the injury to the center scow (there being no evidence that the "Henderson" was struck in more than one place) is that the port scow scraped along the side of the oil barge until it struck the stem of the "Henderson," which had been forced outwards by the blow of the center scow just enough to cut the port scow a little to starboard of her own stem. This also renders immaterial much of libellant's testimony to the effect that, the beam of the scows being thirty-six feet and the distance from the stem of the "Henderson" to the side of the oil barge being only about fourteen feet six inches, by reason of the manner of their being lashed together, it would be impossible for the scow to slide along the side of the oil barge and be cut into by the "Henderson's" stem on her own *starboard bow* (Transcript of



Evidence, p. 1347) ; for it is undisputed that the "Henderson's" lines were parted and that she was forced around back of the stern of the oil barge by the force of the blow, and it will readily be seen that, if this blow was delivered by the center scow, projecting fifty feet in advance of the port scow, by the time the port scow reached the "Henderson" the latter would have been forced around enough to inflict the cut in the blunt bows of the former on the starboard, and not on the port, side.

Diagrams Nos. 3 and 4 herein have been drawn to scale according to the dimensions given in the evidence. In Diagram No. 3 the sidelights J and K of the "Samson" are placed sixteen feet apart, and the point E is four hundred feet ahead of the bow of the "Samson." E represents the nearest point at which, according to the testimony, both lights of the "Samson" can be seen at once. Consequently the angle at which the sidelights on the "Samson" shine across the line of her course is represented by the angle JER on the diagram. As the lights on the "Samson" are placed just aft of the pilot house (Transcript of Evidence, pp. 589-590), and as it appears (Transcript of Evidence, p. 602) that the pilot house was about thirty-five feet from the "Samson's" stem, the lights J and K in Diagram No. 3 have been placed thirty-six feet from the "Samson's" stem, making the total distance from the lights to E four hundred and thirty-six feet. It is therefore easy to calculate the size of the angle JER—something less than 2 degrees. As regards the "Henderson" and the oil barge there is no testimony as to the position of the sidelights except that the law provides that they be fitted

with three-foot screens (Transcript of Evidence, pp. 210-211); but as the "Samson's" lights had such screens (Transcript of Evidence, p. 590) it has been assumed, in making up Diagram No. 4, that the angles of the sidelights on both the "Henderson" and the oil barge would be great enough to cross their respective course-lines four hundred feet ahead of the stem of each, at the points K and L respectively. As a matter of fact, the resulting angles ALE and HKC are more obtuse than could be the case, as it will be observed that the lines LE and KH have been drawn well outside the outboard lines of the vessels, in order to err rather in favor of libellant, as appears hereafter. Yet even so, the angle ALE (the angle at which the starboard or green light of the oil barge would cross the line of her course) is seen to be something less than 5 degrees.

Diagram No. 5 is made up from libellant's Exhibit 1 rather than from libellant's Exhibit 2, both because libellant's Exhibit 1 shows less deflection in the course of the "Henderson" and the oil barge, and is therefore more favorable to libellant's contention, and also because marking on libellant's Exhibit 1 are as accurate as counsel could prevail upon the witness to make them (See Transcript of Evidence, pp. 149-155-165-166-167), whereas the marking on libellant's Exhibit 2 were not intended to be anything but approximate (See Transcript of Evidence, pp. 217-218). From this diagram it appears that while the "Samson" was on the course between D, where she was first sighted by Captain Sullivan, to E, where Captain Sullivan located her at the time she gave the first whistle, her red or port light could

not have been seen by anyone on the Puget Island side of the line PR, drawn from P, a point four hundred ahead of D, at an angle of 13-5 degrees to the line DE. Since libellant's Exhibit 1 shows the oil barge to have whistled about halfway between the points A and B, it is obvious that between the time of sighting the "Samson" and the time of blowing the first whistle no one on the oil barge could possibly have seen both lights of the "Samson;" yet the testimony is undisputed that both these lights were in full view. Similarly the point where the line QR intersects the course of the oil barge represents the first possible point where those on the oil barge could have seen both lights of the "Samson" while the "Samson" was on the course from E to F, between the first and second whistles. In other words, if the accident occurred as claimed by libellant, the "Samson's" two lights could have become simultaneously visible on the oil barge only at a point about halfway between the positions of the oil barge at the first and second whistles respectively.

From the markings on libellant's Exhibit 1 (and it should be noted that in marking up Diagram No. 5 only the finally corrected locations have been used; compare Diagram No. 2) it will be seen that the line TVBS, drawn through both the point of location of the oil barge at the second whistle and the point of collision and barely touching at the point V the course of the oil barge previous to the second whistle, as indicated by Captain Sullivan, represents the course of the oil barge furthest to port and most in line with the ranges, which according to the testimony, she could possibly have adopted

after sighting the "Samson" at the point A. The point V therefore represents the earliest possible position at which the oil barge could have taken that course. Yet the line VX, drawn from that point and not from a point four hundred feet ahead thereof (in order again to err in favor of libellant), at an angle of 43-5 degrees with the line TVBS, intersects the "Samson's" course from F, her location at the second whistle, to C, the point of collision, only about one hundred feet from that point of collision. In other words, the starboard or green light of the oil barge, even assuming it to have been visible four hundred feet ahead of the oil barge at the impossibly large angle shown in Diagram No. 4 would never have appeared to those on the "Samson" until within about one hundred feet of the point of collision. It is therefore obvious that both the red light of the "Henderson" and the green light of the oil barge could not have been almost continuously visible to those aboard the "Samson," as has been repeatedly testified, by the only persons in a position to know, to have been the case.

The testimony has been analyzed thus at length, not in order to complicate the case, but in an endeavor to bring order out of chaos; and it is submitted that only claimant's version of the collision suffices satisfactorily to explain the many apparent inconsistencies and conflicts in the evidence. What may be termed the "unconscious" testimony of Captain Sullivan, Martinson and Crossen—the "internal evidence" afforded by their remarks—the paint on the port scow, the cut in her starboard bow, and the injury to the center scow, taken in connection with the comparative dimensions of the ves-



sels and the fact that the "Henderson's" side was struck in only one place, together with the angles of the side-lights as shown in Diagram No. 5—all combine to show that libellant's version is not correct. Enough has been said, however, to show that all the above testimony fits perfectly into claimant's version; and it needs only a glance at the markings made on libellant's Exhibit 17 and Standard Oil Exhibit 1 to show that the conflict between the undisputed testimony for both libellant and claimant in regard to the lights and the mathematical possibilities of the case would not exist if claimant's version were accepted. Diagram No. 6, traced from libellant's Exhibit 17, and Diagram No. 7, traced from claimant's exhibit A, are sufficient to prove this fact.

### CERTAIN PROMINENT FACTS DISCLOSED BY THE EVIDENCE.

The evidence clearly shows beyond any question, certain prominent facts. A few of these it may be well to recapitulate.

(1) At all times from the time the two vessels came in sight of one another up to within a few seconds of the collision, both lights of the "Samson" were visible from the oil barge and "Henderson" and both lights of the oil barge and "Henderson" were visible from the "Samson."

(2) Both the starboard and the port barges of the "Samson's" tow carried a bright white light. If both of these lights were not seen by those in charge of the oil barge and "Henderson" it was because no sufficient

lookout was maintained on those vessels. Sullivan himself testifies that he was watching the range; that it is to say, looking backward. Martinson, lookout on the oil barge, and Crossan, lookout on the "Henderson," admit that they were not attending to their duties.

(3) All of the barges of the "Samson" tow were in good condition at the time of the collision. After the collision, the port barge and the center barge were both injured—the center barge more severely than the port barge.

(4) This injury to these barges doubtless came from the collision with the "Henderson," as there is no evidence that it came from any other cause; indeed, the witnesses for the libellant who saw the collision all state that, in their judgment, if the "Henderson" was struck by the port barge, as they claim she was, the center barge must have struck the "Henderson" at a point farther aft, but the evidence shows that the "Henderson" was not struck at a point aft of the house, so that it may be said to be established that the center barge struck the "Henderson" about 35 feet from its stem.

(5) The rock barge No. 9 drifted from the point of collision to the place where it was anchored. It was anchored so near the Washington shore that the "Samson" in removing it the next morning dug up mud with her propeller.

(6) The rock barges Nos. 27 and 8 were anchored from the "Samson."

(7) The oil barge must have drifted at least 500 feet from the point of collision before she was anchored. When she anchored she tailed down Clifton Channel.

(8) If the collision occurred at the place indicated by Sullivan, and claimed by the libellant to be the true location of the collision, the course of the "Samson" and her tows is unintelligible, for from that point, going in the direction in which the "Samson" must have sailed and going at the speed at which it is admitted the "Samson" was travelling, it would have been difficult, if not impossible, for the "Samson" to have kept her rock barges and herself from going on the sands of Tenas Il-lihee Island.

(9) The usual and natural course for each vessel was along the lines testified to by Jordan and other witnesses for the claimant; in other words, all witnesses agree that the natural and reasonable course of a vessel towing down stream was to keep above the range line until at or below the point where the collision must have occurred, whatever location may be accepted as the true place of the collision. On the other hand, the natural and usual course for a vessel coming up stream with a tow, to keep under the lee of Puget Island as nearly as possible, and this course was the course usually pursued by Sullivan himself.

## IV.

THE BURDEN IS THEREFORE ON LIBEL-  
LANT TO SHOW THAT THE "HENDER-  
SON" WAS NOT IN FAULT.

It is settled law that, where one vessel has deviated from her course, even for a cause so beyond her control as to make the ensuing accident inevitable, the burden is on her to prove that such deviation was without fault on her part.

1. *The Merchant Prince*,  
Law Reports, (1892) 1 Prob. Div. 179,  
In the Court of Appeal, 1892;
2. *The Olympia*,  
61 Fed. R., 120,  
C. C. A., 6th Cir., 1894;
3. *The F. W. Wheeler*,  
78 Fed. R. 824,  
C. C. A., 6th Cir., 1897;
4. *The Ohio*,  
91 Fed. R., 547,  
C. C. A., 6th Cir., 1898;
5. *The Fortana*,  
119 Fed. R., 853,  
C. C. A., 6th Cir., 1903;
6. *The Edmund Moran*,  
180 Fed. R., 700,  
C. C. A., 2nd Cir., 1910;
7. *Nicholas Transit Co. v. Pittsburgh Steamship Co.*,



196 Fed. R., 65,

Dist. Ct., W. D. N. Y., 1912;

8. *The Lackawanna*,

201 Fed. R., 773,

Dist. Ct., W. D. N. Y., 1913.

The first case cited, that of the *Merchant Prince*, is one frequently quoted in the books. The rule was there carefully formulated by Lord Justice Fry as follows:

“The burden rests on the defendants to shew inevitable accident. To sustain that the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable, or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided.” (At page 189.)

It is submitted that none of Libellant’s testimony is successful in discharging Libellant from this burden. Consequently, according to the equally well-settled principle that where one vessel is solely to blame for a collision she must pay the damages, the damages herein should be assed to Libellant:

9. *Union Steamship Co. v. N. Y. & Va. Steamship Co.*

65 U. S. (24 How. 307,

16 L. C. P. Co. Ed. 699;

U. S. Supr. Ct., 1861;

10. *The Bywell Castle*,  
Law Reports, 4 Prob. Div., 219,  
In the Court Appeal, 1878;
11. *The Maggie J. Smith*,  
123 U. S., 349,  
31 L. C. P. Co. Ed., 175,  
U. S. Supr. Ct., 1887;
12. *The Phoenix*,  
50 Fed. R., 330,  
Dist. Ct., S. D. N. Y., 1892;
13. *The Umbria*,  
166 U. S., 404,  
41 L. C. P. Co. Ed., 1053,  
U. S. Supr. Ct., 1897;
3. *The F. W. Wheeler*,  
*Supra*;
4. *The Ohio*,  
*Supra*;
14. *The Lake Shore*,  
201 Fed. R., 449,  
Dist. Ct., N. D. Ohio, 1912.

The case of *The Phoenix*, cited above, is somewhat similar to the case at bar. In that case Libellant's canal boat, in tow of the steam tug *Atlanta*, was the outer of two boats on the *Atlanta's* port side, here being another boat on her starboard side. When less than half-way across the North River, the fog shut down somewhat thickly near the water, but much less higher up. Fog signals indicating a tow had been regularly given

by the *Atlanta*, and when the hull of the *Phoenix* as well as her mast, became visible at a considerable distance off the port bow, the *Atlanta* gave one whistle which the *Phoenix* answered, but the *Phoenix* delayed reversing until Libellant's canal boat came in sight about fifty feet away. The *Atlanta*, seeing that the *Phoenix* kept on her course and that a collision was imminent, had reversed her engines when from two hundred to three hundred feet still separated the vessels, but Libellant's canal boat was struck a little forward of amidships. The Court said:

"The evidence leaves no doubt that the *Phoenix* had timely notice of the *Atlanta*'s presence with a tow a little on her starboard hand, and that she saw the smokestack of the *Atlanta* in abundant time to have avoided her, as it was her duty to do, either by going to starboard or by stopping and reversing. She delayed reversing according to her own pilot's testimony, until the canal boat came in sight not over 50 feet distant. This delay fixes the blame upon the *Phoenix*." (At p. 331.)

Similarly in the case at bar, the fact that Captain Sullivan, although he saw the "*Samson*" and her tow bearing straight down upon him without apparent change of course, as he testifies, took no measures to avoid the possible collision until just before the collision occurred (even according to Libellant's version), fixes the blame for the accident solely upon the "*Henderson*" and her tow.

AND, THE EVIDENCE BEING RATHER THAT THE "HENDERSON" AND NOT THE "SAMSON" WAS TO BLAME, THE DAMAGES SHOULD EITHER BE ASSESSED TO THE "HENDERSON," OR ELSE THE LIBEL SHOULD BE DISMISSED, BOTH PARTIES PAYING COSTS BY THEM MADE.

Even if the "Samson" could have avoided the accident, as it now appears she perhaps might have done, by adopting a different course of action, such as stopping sooner, or steering to port across the bow of the oil barge, nevertheless the "Henderson" and the oil barge, having by their own wrongful maneuver placed the "Samson" and her tow in a position of danger, are solely responsible.

10. *The Bywell Castle,*  
*Supra;*

11. *The Maggie J. Smith,*  
*Supra;*

4. *The Ohio,*  
*Supra.*

In the *Bywell Castle*, cited above, a leading case on the point, this question was carefully considered. The screw steamer *Bywell Castle* and the paddle wheel steamer *Princess Alice* were approaching each other on the Thames, red light to red light. The *Princess Alice* starboarded her helm for some unexplained reason, after having had to do so slightly in order to pass a powder hulk, so that she crossed the bows of the *By-*



well Castle and the latter saw her green light. The Captain of the Bywell Castle thereupon put his helm hard aport, probably in an effort to escape collision, but struck the Princess Alice on her starboard bow and sunk her, with the result that over five hundred passengers and crew of the latter were drowned. At the first hearing before Sir R. Phillimore and the Elder Brethren of Trinity House, both vessels were held to be in fault; but in the Court of Appeal the Lords Justices James, Brett and Cotton held that the Princess Alice was alone in fault.

“A ship has no right,” said Lord Justice Brett, at page 223, “by its own misconduct, to put another ship into a situation of extreme peril, and then charge that other ship with misconduct.”

And Lord Justice Cotton (page 228), in a clear and careful opinion, formulated the rule as follows:

“The sound rule is that a man in charge of a vessel is not to be held guilty of negligence, or as contributing to an accident, if in a sudden emergency caused by the fault or negligence of another vessel, he does something which he might under the circumstances as known to him reasonably think proper; although those before whom the case comes for adjudication are, with a knowledge of the facts, and with time to consider them, able to see that the course which he adopted was not in fact the best.”

This case is quoted with approval in the Ohio, above cited, where the vessel *Siberia*, probably owing to the suction of an overtaking steamer, sheered from her prop-

er course and collided with the Ohio, a vessel coming in the opposite direction. Judge Lurton, just before citing the *Maggie J. Smith* and the *Bywell Castle* (both cited above), said:

“The Ohio was placed in a situation of extreme danger by the wrongful deviation of the *Siberia* from her course. The rule is well settled that when one vessel by her own wrongful maneuver places another in a situation of extreme peril, and the latter does not act with that promptness and accuracy of judgment which might be expected when there was complete presence of mind, and happens to delay or do something, which turns out to have been a mistake, she will not thereby become such a contributor to the mischief as to render her liable for damages.” (At page 558.)

It is, therefore, clear that no blame can be attached to the “*Samson*” for neglecting to do whatever it may be contended she might have done to avoid the collision. She was on her course, if anything a little closer to Puget Island than was customary, and had no reason to believe that the “*Henderson*” and the oil barge, although apparently steering a peculiar course, would not finally adopt the course indicated by the signals from the oil barge in time to escape a collision. When, at the last moment, it became certain that they would not do so, Captain Jordan on the “*Samson*” put his helm hard aport, swinging the tow around so as to head into Puget Island. It is obvious that this was the only thing he could have done under the circumstances; and it is sub-

mitted that the evidence is sufficient to show that had he not done so, and the rock scows had hit the oil barge squarely instead of a glancing blow, not only the "Henderson" but the oil barge as well would have been sunk. Such being the circumstances, the language of the cases unequivocally prohibits the imputing of any negligence to the "Samson" sufficient to justify the division of damages.

The foregoing has of course been predicated upon the acceptance by this Court of Claimant's version of the accident pursuant to the analysis of the testimony given above. Should, however, this Court consider Claimant's version as not true, deeming it merely a possible inference from the testimony, and regard the case as one in which neither party has established, to the satisfaction of the Court, the negligence of the other, then, it is submitted, this libel should be dismissed, each party to pay costs by them made.

15. *The Centurion*,

100 Fed. R., 663,

C. C. A., 6th Cir., 1900.

In this case the collision was caused by a sudden sheer of the steamship Marshall which struck the steamship Centurion on the port side just as the two vessels were passing each other, in a river from twelve hundred to fifteen hundred feet wide, each going at the rate of from seven to eight miles an hour. There was much testimony on the question of suction, but the evidence failed to establish the negligence charged by either party against the other, or to show the true cause of the acci-

dent. The case was disposed of by Judge Day (pp. 666 to 667) in the following words:

“The case seems to be, if not strictly an accident occurring through inscrutable fault, one wherein there is a failure of proof to establish the negligence charged by one party against the other. This was the conclusion reached by the learned judge who heard the case in the District Court. Finding no error, the decree is affirmed; each party to pay costs by them made, respectively.”

It must be admitted that, unless Claimant's version of the accident be accepted, the testimony for Libellant is of such a nature as to make any reasonable reconstruction of what actually occurred practically impossible. If, therefore, this Court finds itself in a dilemma of this nature, it is submitted that the Centurion indicates the proper course of action.

## V.

EVEN ASSUMING THE “SAMSON” TO HAVE BEEN IN FAULT, AND LIBELLANT'S VERSION TO BE THE TRUE ONE, THE EVIDENCE SHOWS SUCH A DISREGARD BY THE “HENDERSON” AND HER TOW OF BOTH THE RULES OF NAVIGATION AND THE DICTATES OF PRUDENCE AS TO WARRANT THE DIVISION OF DAMAGES ACCORDING TO THE FAMILIAR RULE.



IN the PILOT RULES FOR ALL HARBORS, RIVERS AND INLAND WATERS OF THE UNITED STATES, EXCEPT THE GREAT LAKES AND THEIR CONNECTING AND TRIBUTARY WATERS AS FAR EAST AS MONTREAL AND THE RED RIVER OF THE NORTH AND RIVERS EMPTYING INTO THE GULF OF MEXICO AND THEIR TRIBUTARIES (hereinafter called the "Pilot Rules"), as amended by the Board of United States Supervising Inspectors, Steamboat Inspection Service, in February, 1911, and approved by the Secretary of Commerce and Labor, under the authority of an Act of Congress approved June 7, 1907, and the Act of Congress approved February 14, 1903, to become effective on and after April 1, 1911, Rule I reads as follows:

**RULE I.** If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle, the **DANGER SIGNAL.**

The language of this rule is identical with that of Rule III of the Steering and Sailing Rules promulgated by the Act of Congress approved June 7, 1897, with the exception of the addition of the words "The **DANGER SIGNAL.**"

No recapitulation of the testimony for Libellant is needed to prove that whatever else Captain Sullivan did,

he did not obey this rule. According to his own story, he was steering very close to the Oregon shore, so close, indeed, that when he put his helm hard aport just before the collision he recognized the risk of going ashore, but preferred that to being run into (Transcript of Evidence, p. 117). He had noticed the "Samson" and her tow bearing down upon him on an apparently unchanged course; this, after the exchange of whistles that had taken place, was a situation which he as a reasonable man and experienced navigator, could hardly have "understood"; yet he did nothing either to induce the "Samson" to alter her course or to prevent the possibility of collision by some action on his own part, until just before the collision, when he blew the second whistle. Thus not only did he disregard the provisions of the "Pilot Rules" covering such cases, but, it is submitted, he failed to take even the most ordinary and obvious precautions.

RULE XI of the "Pilot Rules," identical with ARTICLE 27 of the Steering and Sailing Rules in the Act of Congress approved June 7, 1897, is to the effect that

"In obeying and construing these rules due regard shall be had to all DANGERS OF NAVIGATION AND COLLISION, and to any SPECIAL CIRCUMSTANCES which may render a departure from the above rules necessary in order to avoid immediate danger."

This rule gives a wide latitude for such individual action on the part of those in command of vessels in danger as the emergency may seem to call for; but it cannot

reasonably be held to cover and excuse a total lack of precautionary action. Yet Captain Sullivan (Transcript of Evidence, pp. 118, 143-144, and 168-169) has endeavored to use that rule as an excuse and a justification for his failure to do anything but blow one whistle about thirty seconds or a minute before the collision occurred.

Such conduct on the part of Captain Sullivan, the pilot of both the oil barge and the "Henderson," clearly was negligence sufficient, even if Libellant's version of the accident be accepted *in toto*, to charge the "Henderson" and the oil barge with the responsibility for the collision equally with the "Samson." In such cases it is the settled rule of Admiralty jurisprudence that the damages be divided:

9. *Union Steamship v. N. Y. & Va. Steamship Co.*,  
*Supra*;
16. *The Maria Martain v. Northern Transportation Co.*,  
79 U. S. (12 Wall.) 31,  
20 L. C. P. Co. Ed., 251,  
U. S. Supr. Ct., 1871;
17. *The Columbia*,  
23 Blatchf., 268;  
C. C. E. D. N. Y. 1885;
18. *W. Va. Central & P. Ry. Co. v. The Isle of Pines, et al.*,  
24 Fed. R., 489,  
Dist. Ct., S. D. N. Y., 1885;

19. *The A. W. Thompson*,  
39 Fed. R., 115,  
Dist. Ct. S. D. N. Y. 1889;
20. *The Louise*,  
52 Fed. R., 885;  
C. C. A. 4th Cir. 1892;
21. *The Lisbonense*,  
53 Fed. R., 293,  
C. C. A. 2nd Cir. 1892;
22. *The George W. Childs*,  
67 Fed. R., 269,  
Dist. Ct. E. D. Pa. 1895;
23. *The Victory*,  
68 Fed. R., 395,  
C. C. A., 4th Cir. 1895;
24. *The Maryland*,  
182 Fed. R., 829,  
Dist. Ct. E. D. Va. 1919.

This principle is too familiar to need elaboration. In *Union Steamship Co. v. N. Y. & Va. Steamship Co.*, cited above, the United States Supreme Court has concisely formulated it, in the opinion of Mr. Justice Clifford (L. C. P. Co. Ed. p. 701), as follows

“If the fault was one committed by the libellant alone, proof of that fact is of itself a sufficient defense; or if the respondent alone committed the fault, then the libellant is entitled to recover; and clearly, if both were in fault, then the damages must be equally apportioned between them.”



Its application to cases like the one at bar was made certain by the same Court in the later case of the *Maria Martin*, also cited above, where Mr. Justice Clifford again delivered the opinion:

“Errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from taking every proper precaution required by the special circumstances of the case to prevent a collision, as the Act of Congress provides that in obeying and construing the prescribed rules of navigation, due\* regard must be had to the special circumstances rendering the departure from them necessary in order to avoid immediate danger.” (L. C. P. Co. Ed. p. 255).

(\*So in L. C. P. Co. Ed.)

This language has been frequently quoted with approval in subsequent cases (See *The Louise* and *The Victory*, cited above); and the whole matter has been ably summed up, both in the United States Supreme Court and in a later case in the Circuit Court of Appeals for the Fourth Circuit, as follows:

“If there be any uncertainty as to the intention of the approaching vessel, this of itself calls for the closest watch and the highest degree of diligence on the part of the other vessel with reference to her movements, and it behooves those in charge to be prompt in availing themselves of every resource to avoid, not only a collision, but the risk of such a catastrophe.” (Simonton, J., in *The Louise*, cited above, at p. 888.)

“Sailing rules were ordained to prevent collisions between ships employed in navigation, and to preserve life and property embarked on that perilous pursuit, and not to enable those whose duty it is to adopt, if possible, the necessary precautions to avoid such a disaster, to determine how little they can do in that direction, without becoming responsible for its consequences, in case it occurs.” (Mr. Justice Clifford, in *The American v. Camden & Amboy R. R. Transp. Co.*, 92 U. S. (2 Otto) 432, 23 L. C. P. Co. Ed., 724; U. S. Supr. Ct., 1876, cited in *The Louise, Supra.*)

### THE DAMAGES.

J. H. Johnson was the first witness called on behalf of the libellant to establish the amount of the damages. Over the objection of the claimant he testifies, on page 1459, that it would cost in 1911 to replace the “M. F. Henderson” \$51,000.00. On page 1461 he estimates the value of the “Henderson” at the time of the collision at \$44,000.00. On pages 1464 and following he gives a detailed statement. The details of this statement were taken, for the most part, from information furnished him by Captain Shaver, president of the libellant. On page 1472 he admits that some of the floor timbers of the “Henderson” were soft and rotten, and on page 1473 he admits that these timbers would have had to be repaired in three or four years. On page 1475 he admits that the hull, when he saw it after the accident, was in such shape that it could have been repaired. On page 1476 he admits that such repairs would have cost about

\$2500.00 and would have made the hull as good as it was before the accident. It appears from his testimony, page 1533, that he did not examine the hull of the "Henderson" until February, 1913. The award of the District Court was based practically, if not entirely, upon the testimony of this witness. On cross-examination this witness testifies that in large measure it was hear-say, or based upon hear-say and that the witness was not in a position to testify regarding the damages.

Captain J. W. Shaver was the next witness on damages. It appears from his testimony, pages 1553 to 1554, that he had bought and sold vessels. On the same page he testifies that the "Henderson" at the time of the collision was worth \$45,000.00, and yet the record furnished by the books introduced in evidence by Conway, pages 1605 and following, shows that the new "Henderson" cost \$27,726.68. With this cost a part of the salaries of the officers of the Shaver Transportation Company was included, though the new "Henderson" was built by contract. Captain Shaver himself, page 1557, introduced libellant's Exhibit 27, showing the earnings and disbursements on account of the "Henderson" for the year 1909, 1910 and the first six months of 1911. From this exhibit it appears that during the year 1909, without making any deduction for depreciation, the net earnings of the "Henderson" were not quite \$14,000; that for the year 1910, again making no deduction for depreciation, the net earnings of the "Henderson" were \$14,007.30; and that for the six months of 1911, again making no deduction for depreciation, the earnings of the "Henderson" were \$3257.12. These earnings include

a part of the office expenses of the Company, it may be said of the fixed charges of the company. This evidence was also introduced over the objection of the claimant. It is significant, however, that during the year 1911 the gross earnings of the "Henderson" were not 50 per cent of the gross earnings for the corresponding months of 1909 and 1910. No explanation is made of this unless it be the explanation made by the witness Hosford, who testifies on page 1596 that at the time the "Henderson" was sunk there was no passenger route upon which she could earn any profit. It appears also from the testimony of Captain Shaver, page 1663, that his company carries on their books no depreciation account and on pages 1695-1696 he was wholly unable to reconcile why he claims that the old "Henderson" was worth \$45,000 whereas the new "Henderson," which was as good a boat, cost less than \$38,000.00.

Captain O. W. Hosford was the next witness on behalf of the respondent. He valued the "Henderson" at the time she was sunk, at \$45,000. It appears from his evidence on page 1588 that he bought the "Weown," when she was about three years old, for \$26,000, and he estimates that a boat of that character was worth \$10,000 less than the "Henderson." On page 1592 he states that he thinks the "Hercules" was as good a boat as the "Henderson."

The next witness on behalf of the libellant, was A. M. Conway, bookkeeper for the Shaver Transportation Company. He knew nothing but what the books of the Shaver Transportation Company showed. He testifies,



page 1606, that the total cost of raising the old "Henderson" was \$8,424.99, and on page 1610 that the total cost of the new "Henderson" was \$27,726.68. Among the items of cost of salvage are included a charge for the "Cascades" at the rate of \$150.00 per day. The evidence shows that it cost less than \$100.00 a day to operate the "Cascades" and that she is a boat less valuable and of less earning power than the "Henderson"; that the net earnings of the "Henderson" during the six months prior to the collision were only \$30.00 per day. Another charge included in the salvage was the services of the "Wauna" at \$125.00 per day. The "Wauna" was a smaller boat than either the "Henderson" or the "Cascades," could be operated more cheaply than either of them and her earning power was less than that of the "Henderson" or the "Cascades." A charge was made for each of these two boats for a period of fourteen or fifteen days. The record, we may say, is replete with items showing extortionate charges for the vessels owned by the libellant which were engaged in the raising of the "Henderson."

Charles M. Nelson was also a witness on behalf of the libellant. He was the proprietor of the Portland Shipbuilding Yard, which built the hull of the new "Henderson." The contract price was \$15,500, and he testifies, page 1756, that in his judgment it would have cost as much to have repaired the hull of the "Henderson" and make her as good as before the accident as a new hull would have cost. He does not deny, however, that he had a talk with Daniel Kern at the time the hull of the old "Henderson" was on the ways at his yard, and

that he remembers Kern speaking to him about buying the hull. He does not recollect having told Kern that he would fix up the hull and fit her up as a barge for the sum of \$3000, but he does not deny that such a conversation took place and that to have fixed it up and fitted it up for a barge, the hull would have been as strong as the hull on the "Henderson." (Record, p. 1759).

William B. Honeyman was next called as a witness on behalf of the libellant. He testifies that he is a marine surveyor and that he examined the "Henderson" when she was hauled out on the ways at South Portland and made a thorough examination of the hull and machinery in conjunction with Captain Crowe. He put the valuation of the boat at between \$35,000 and \$36,000. (Record, p. 1766). He admits that the statement of salvage expenses he got from Captain Shaver.

The first witness called for the defense was Joseph Supple. He was a ship builder and has been in business "on his own hook" for about thirty-five years, and was acquainted with the "Henderson" and with her structure. He looked at the "Henderson" while on the ways after she was wrecked. On page 1782 he states that it would cost to duplicate the "Henderson" in July, 1911, \$40,000 and that with ten years' wear she would be worth, in his judgment, not over \$25,000. He testified particularly in regard to the condition of the hull and the injuries. On page 1783 he testifies that the hull was in a repairable condition and on the same page testifies *that he would consider a reasonable value to put*

the "*Henderson*" in as good shape as it was before the accident, the sum of \$16,000. On page 1784 he testifies that, in his judgment, there was not more than two years' more usage in the hull. One of the items of expense presented by the libellant was \$310.00 for pulling the boat on the ways of the Portland Ship Yards. This witness testifies, page 1786, that \$100.00 was what was usually charged for that service. On cross-examination, page 1790, this witness testifies that in 1901 it would have cost about \$30,000 to have built a boat like the "*Henderson*." On pages 1796-7, on cross-examination, he testifies that, in his judgment, \$2500.00 *would have been a good price to put the hull of the "Henderson" in as good shape as it was before the collision.* This testimony he repeats on pages 1800 and 1801, also on cross-examination, and on pages 1803 and 1804 he states that to put her back in as good shape as she was before would probably cost \$28,000, including machinery and everything, but that she would be worth \$3000.00 more after the repairs than before.

Albert Duncan was the second witness called on the question of damages on behalf of the defense. He had been engaged as a shipwright in Portland for twenty-five years. He had examined the hull of the "*Henderson*." On page 1809 he testifies that, in his judgment, *the hull of the "Henderson" could be repaired and put in the same condition as before the wreck for the sum of \$4000.*

Joseph Paquet was the next witness called on behalf of the claimant on the question of damages. He had

been in the boat building business in Portland for about 40 years; had built and repaired all manner of boats and raised quite a number of boats which had been sunk; he was also acquainted with the "Henderson." On pages 1825 to 1827 he testifies that in his judgment the "*Henderson*" *should have been raised for \$5000.* On page 1831 he testifies that *the hull could have been put in as good condition as before the wreck for \$4500.00.* On page 1838 he testifies that *in 1911 he thinks that a boat such as the "Henderson" could have been hired in this market for about \$750.00 a month.* On page 1839 he testifies that such a boats as the "Henderson" fully equipped and new would cost about \$38,000. On page 1840 he testifies that such a boat as the "Henderson" built in 1901 and having been operated for ten years would be of the value in this market of \$25,000. On page 1860, on cross-examination this same witness testifies that in his judgment the "Henderson" could have been built in 1911 for \$38,000 and *that as she was ten years old she was worth \$25,000.00.*

Robert M. McIntosh, another witness on behalf of the claimant, testifies that he was a ship carpenter and contractor and had been engaged in that business for over 30 years and had seen the hull of the "M. F. Henderson." On page 1877 he testifies that, in his judgment, *the hull could have been repaired; that he made a careful examination of it and a careful estimate and that in his judgment, the hull could have been fixed up as good as it was before the collision for \$4,000.*

Peter Carstens, another witness called on behalf of the defense, testified that he had been with the O. R. &



N. Co. for 32 years and has always been connected with steamboats,—either building steamers or running steam boats or patching up steam boats. He testifies that he was familiar with such boats as the “Henderson” and has been handling that kind of boats the most of the time, was familiar with their construction and with repairing them. He made an examination of the hull of the “Henderson” on the 14th day of August, 1911, and estimated that *it would cost to repair the hull \$4162.00; that to rebuild the upper works would cost \$8812; moving the machinery would have cost \$2000.* On page 1887 he gives this estimate and on the same page testifies that, in his judgment *such a vessel as the “Henderson,” allowing ten years for depreciation and having had incidental repairs made to her from time to time, was worth about \$20,000.* On page 1893 he testifies that he found the condition of the hull to be such that *it would need repairs within a year to the extent of \$6000.00 had there been no collision.* This witness had had much experience in raising boats on the Willamette and Columbia rivers. He testifies on page 1896 that *it was not necessary in raising boats to have more than one tug boat.* On the same page he testifies that to have built a new boat like the “Henderson” in 1911, using such salvage as could be obtained from the “Henderson” would cost \$23,000. A detailed report made by this witness to the Standard Oil Company on August 14, 1911, is found on page 1905 and page 1906 of the record, and is in accord with his testimony.

Daniel Kern, the President of the claimant, was called as a witness on the question of damages. He

had raised several boats in the Columbia River and testifies on pages 1908 and 1909 what apparatus it would be necessary to provide and the manner in which a boat sunk, such as the "Henderson" should be raised. He also testifies on pages 1909 and 1910 as to the reasonable rental value of boats like the "Cascades" and "Wauna." He was also familiar with the waters where the "Henderson" was sunk, and on page 1913 testifies that in his judgment a *reasonable sum to be expended for raising the "Henderson" would be \$5,000.00.* On page 1914 he testifies that he is acquainted with the "Henderson" and that his Company owns a boat of about the same character. This boat was the "Hercules." He testifies that though he had never built any new boats of that character he thinks that the "*Henderson*" at the time she was sunk *was worth about \$25,000.00* and that they carried their boat on their books at \$22,500.00. On pages 1922 and following he was closely cross-examined in regard to his estimate of the reasonable value of raising the "Henderson."

Other witnesses were called for the purpose of showing the exorbitant charges made by the libellant and testify pages 1926 to 1969. Daniel Kern was re-called by the libellant for further cross-examination, pages 1969 and following. He testifies that in his judgment the "Hercules" was a better boat than the "Henderson" and that she cost to build her in 1899, \$19,000.00.

Captain J. E. Copeland was also recalled for the purpose of showing the cost of the "Henderson." He testifies on page 1977, that at that time when he had

hired the "Henderson" he was informed by Captain Shaver, President of the libellant, that the "Henderson" had cost \$32,000.00. He was also examined in regard to *the manner of raising boats sunk in the Columbia*, and testifies, among other things, that *one tug boat was sufficient*.

Captain Shaver, called on rebuttal by the libellant, on page 1989, testifies that the "Henderson" when new cost \$31,000.00.

Tabulated, the evidence shows

	Value New	Value When Sunk	Cost of Repairing
Johnson .....	\$51,000	\$44,000	\$.....
Shaver .....	38,000	45,000	.....
Hosford .....	.....	45,000	.....
Honeyman .....	.....	36,000	.....
Supple .....	40,000	25,000	16,000
Paquet .....	38,000	25,000	.....
Carstens .....	38,000	20,000	15,000
Kern .....	.....	25,000	.....

## THE DAMAGES DEMANDED BY LIBELLANT ARE GREATLY EXAGGERATED.

If Claimant's version of the accident be accepted, of course no question as to Claimant's liability for damages will arise; but it has been deemed pertinent, in view of the possibility of the Court's adopting Libellant's version and dividing the damages, to present a

brief discussion of Libellant's evidence as to the amount of damages sustained.

In Libellant's amended and supplemental libels allegation is made that the value of the "Henderson" at the time of the collision was fifty thousand dollars (\$50,000.00), and the value of the supplies lost on her fifteen hundred dollars (\$1500.00), the salvage expenses ten thousand dollars (\$10,000.00), making a total of sixty-one thousand five hundred dollars (\$61,500.00); this, less sixteen thousand dollars (\$16,000.00), the value of the salvage recovered, leaves a total of forty-five thousand five hundred dollars (\$45,000.00), claimed by Libellant as damages herein. By these libels it also appears that Libellant is suing for the value of the "Henderson" as a total wreck.

The law governing the measure of damages in such cases is stated in Mr. Spencer's treatise on Marine Collisions as follows:

"Restitution is the rule in all cases where repairs are practicable, and compensation when the loss is total. The measure of damages in case of total loss is the market value of the vessel at the time of the collision, together with its cargo and freight, and such other losses as are a direct result of a collision. The market value of the vessel, and not its real or intrinsic value or cost of construction, is ordinarily the measure of damages. The recovery is limited to the market value, and damages in excess of such value may not be assessed by reason of additional value to the owner, owing to peculiar fitness for the trade in which it is engaged, or other-



wise; nor is the market value to be determined by what the owner would have been willing to take for the vessel, but it is the amount for which the vessel would have sold in the open market." (Spencer on Marine Collisions, Sec. 200, p. 360.)

25. *The Laura Lee*,  
24 Fed. R., 483,  
Dist. Ct., E. D. La., 1885;
26. *The City of Alexandria*,  
40 Fed. R., 697,  
Dist. Ct., S. D. N. Y., 1889;
27. *The Havilah*,  
50 Fed. R., 331,  
C. C. A., 2nd Cir., 1892.

In determining the value of a vessel at the time of the collision the Court necessarily has to consider all the circumstances bearing on such value that the evidence affords.

28. *La Normandie*,  
58 Fed., 427,  
C. C. A., 2nd Cir., 1893.

This, as pointed out by Judge Lacombe, at page 431 in the case last cited, is peculiarly the case where purchases and sales of property are not sufficiently frequent to give a readily ascertainable market value.

The testimony in the case at bar regarding value is voluminous and conflicting. Libellant's witness Johnston has testified that a new vessel similar to the old

“Henderson” would cost \$43,882.21 (Transcript of Evidence, p. 1466). It should be noted, however, that on cross examination the testimony of this witness seems to be composed largely of guesswork and hearsay from Captain Shaver, and Claimant’s proctor has moved to strike it out on that account (Transcript of Evidence, pp. 1479-1528). Libellant’s witness Conway, under objection, placed the cost of a new “Henderson” similar to the old at \$38,415.80 (Transcript of Evidence, pp. 1605, 1610); Captain Hosford, another witness for Libellant, placed the cost of a new “Henderson” (likewise under objection) at anywhere from fifty to fifty-five thousand dollars, although it was brought out on cross-examination that he had no definite basis for this opinion (Transcript of Evidence, pp. 1577-1584); and Captain Shaver (Transcript of Evidence, pp. 1562-1573) has testified at length concerning such a cost, all under objection by Claimant’s proctor. It is submitted that none of this evidence is competent as bearing upon the question of the old “Henderson’s” value at the time of the collision. To quote again from Mr. Spencer:

“The general rule is that the value of the vessel is the open market value at the place where the collision occurred. This has no reference to what it is worth to the owner, nor what he could have sold it for, but what it would have brought offered unreservedly in open market. \* \* \* By the term ‘open market’ is not meant the price paid by the owner, but the same for which it would sell in open market. \* \* \* The owner of the vessel

lost can only recover the market value of his ship, although this may be less than the price paid for it or less than the cost of construction." (Sec. 201, pp. 363-364).

The reasons for this rule were clearly set forth in the *Laura Lee*, cited above:

"In adjusting the loss claimed to have been incurred by the libellants, \* \* \* we should consider that in every sale the consent of the owner of the thing sold must be obtained, and that it is often the case that such consent to sell has to be paid for by the purchaser in addition to the sum which may in the market fully represent the value of the thing sold. When the *Greenville* became a wreck, the power on the part of the libellants to consent to part with her ceased, and the owners of the *Lee* should not now be required to contribute any sum which represents the amount which the owners of the *Greenville* might have felt justified in asking from a purchaser for their consent to be deprived of her especial usefulness to them." (Boarman J., at p. 484.)

*A fortiori*, if the original cost of construction is not to be taken as the measure of damages, the estimated cost of a new vessel similar to the one wrecked is, to say the least, irrelevant. The quotations just made likewise render immaterial the testimony of Captain Shaver (Transcript of Evidence, p. 1554), that he would not have sold the "*Henderson*" for fifty thousand dollars.

It may, however, be noted that there is a wide discrepancy between the different values placed on the "Henderson" at the time of the collision by Libellant's witnesses and by the witnesses for the Claimant and for the Standard Oil Company. For instance, her value after ten years of use is put by both Supple (Transcript of Evidence, p. 1782) and Paquet (Transcript of Evidence, p. 1840, under objection) to be only \$25,000.00. The amount necessary to repair her hull and to put it in the same shape as it was in before the collision, is variously estimated at from \$16,000.00 (Supple, Transcript of Evidence, p. 1783) to \$4,000.00 (Duncan, Transcript of Evidence, p. 1809, subject to Libellant's motion to strike out, and McIntosh, Transcript of Evidence, p. 1877, under objection). Witness Carstens (Transcript of Evidence, pp. 1905-1906) in his letter of August 14, 1911, to the Standard Oil Company, estimated the cost of repairing the steamer and making her "as good as she was before the collision" at \$14,794.00, and the cost of a new boat similar to the old "Henderson" at \$26,500.00 (Claimant's Exhibit "E," objected to as incompetent, although not as being a copy, Transcript of Evidence, pp. 1904-1905). Many more instances of widely different expert opinions on this subject could be adduced; but it is submitted that enough has been here brought forward to indicate the doubtful dependability of the various values testified to by Libellant's witnesses. It needs only a cursory examination of the evidence to show that the damages demanded by Libellant are greatly exaggerated. For instance, the cost of raising the wreck is put by Libel-



lant at \$8,000.00 (Transcript of Evidence, p. 1625, under objection). It appears that this enormous sum is made up by charging rental for three of Libellant's vessels, one of which, the "Cascades," was almost constantly on hand at the scene of the wreck for four or five days at the rate of \$150.00 a day, while the "Shaver" and the "Dixon," which were employed at various times, were charged for at the rate of \$8.00 an hour. The "Echo," a launch carrying three men, was charged for at the rate of \$30.00 a day for 15 days. It is in evidence that the "Henderson" was Libellant's most profitable vessel (Transcript of Evidence, p. 1686); yet she only earned on an average of \$30.00 a day, and cost on an average of somewhat less than \$100.00 a day to operate (Transcript of Evidence, pp. 1681-1685), although Captain Shaver testified (Transcript of Evidence, p. 1681) that it cost \$125.00 a day to operate her. In the face of these facts it seems clear that a charge of \$150.00 a day for the "Cascades," a smaller boat than the "Henderson," and charges at the rate of \$192.00 a day apiece for the "Shaver" and the "Dixon," none of which vessels had the earning capacity of the "Henderson," is nothing short of exorbitant. Similarly it is in evidence (Transcript of Evidence, p. 1694) that the wages of the men employed on the "Echo" launch amounted to not more than \$225.00 a month; yet the charge made for her services by Libellant amounted to \$450.00 for only 15 days. Again it appears from the testimony (Transcript of Evidence, pp. 1697-1704) that most of the equipment on the "Henderson," such as mattresses, sheets, pillows, dining room table, safe, etc.,

were charged for as if new; although they were in fact old, and would bring nothing but second hand prices in the market. It is also worth noting that Libellant had no inventory of the equipment claimed to have been lost on the "Henderson" (Transcript of Evidence, pp. 1932-1733); and that all the information which Captain Crowe got in regard to the items of this nature enumerated by him as being on the "Henderson" was obtained from Captain Shaver (Transcript of Evidence, p. 1733).

It is submitted that Libellant's testimony as to the value of the "Henderson" at the time of the collision is both untrustworthy and grossly exaggerated; but, in addition, even according to Libellant's own itemized testimony, the allegations as to damage contained in the libel are far in excess of the truth. In the report made by Captain Crowe, Honeyman and Carstens, introduced in evidence over the objection of Claimant's proctor, and marked "Libellant's Exhibit 32" (Transcript of Evidence, pp. 1998-2003), the value of the old "Henderson" at the time of the collision is put at \$38,304.00; the supplies lost at \$418.71; the provisions lost at \$83.99; and the cost of salving the wreckage at \$8,414.84, making a total of \$47,221.54. The value of the salvage recovered is put at \$16,835.00. This, subtracted from the total as above, leaves only \$30,386.54, over \$15,000.00 less than the \$45,500.00 claimed as total damages by Libellant herein.

The damages suffered by Claimant, put at \$604.12 in Claimant's answer, are, it will be noted, with the exception of \$45.00 for the loss of time on the damaged

scows, testified to in detail by Claimant's witness Kern (Transcript of Evidence, pp. 1914-1917).

## VII.

THE LIBEL SHOULD, IN ANY EVENT, BE DISMISSED AS TO BARGE NO. 8, BARGE NO. 9, AND BARGE NO. 27.

The evidence is undisputed that Barge No. 8, Barge No. 9, and Barge No. 27, comprising the tow of the "Samson," had no motive power of their own. Neither did they do any steering. In fact, they were as much in the control of the "Samson" as if they had been integral parts of the "Samson" herself. Such being the case, it is clear that no liability for the collision can attach to them and the libel as regards them should, in any event, be dismissed.

Mr. Spencer sums up the law on this point in the following words:

"Where a tug in charge of its own master in the ordinary course of its employment, undertakes to tow another vessel from one point to another by the use of its own motive power, having entire control of the course and direction of the movements of the latter, it is responsible for the proper navigation of both; and where injury is received under such circumstances, the aggrieved party must look to the tug and its owners for compensation, and not to the tow." (Spencer on Marine Collisions, Section 122, page 261).

29. *The James Gray v. The John Fraser*,  
62 U. S. (21 How.) 184, 16 L. C. P. Co.  
Ed. 106),  
U. S. Supr. Ct. 1859.
30. *Sturgis v. Boyer*,  
65 U. S. (24 How.) 110, 16 L. C. P. Co.  
Ed. 591,  
U. S. Supr. Ct. 1860.
31. *The J. H. Gautier and The Herbert Manton*,  
5 Benedict, 469,  
Dist Ct. S. D. N. Y. 1872.  
*Affirmed* in 14 Blatchf. 37,  
C. C. (S. D. N. Y.) 1876.
32. *The John Cooker and The James W. Eaton*,  
10 Benedict, 488, 13 Fed. Cases, 665, (Fed.  
Case No. 7337),  
Dist. Ct. E. D. N. Y. 1879.
33. *The Doris Eckhoff*, 32 Fed. R. 555, Dist. Ct.  
S. D. N. Y., 1887.

The proctors for Libellant, in their memorandum brief submitted to this court, have stated that the above-cited case of *Sturgis v. Boyer* is "against the position maintained by counsel" for Claimant. This brief adduced no proof of this statement; but it refers to the fact that in *Sturgis v. Boyer* the distinction that the tug alone, and not the tow, was responsible for the collision, was made only in the final decree after full hearing and in apportioning the liability between the several parties. Yet the proctors for Libellant, in the brief referred to, go on and quote the case of *The John*



*Cooker and The James W. Eaton*, cited above, as authority for the position that in the case at bar both the "Samson" and her three barges are to be held liable merely because a common stipulation covering both was filed by Claimant herein. It is submitted that the practice of the United States Supreme Court, exhibited in *Sturgis v. Boyer*, making the above-mentioned distinction in the final decree, effectively disposes of this latter contention made by Libellant's proctors. It may be conceded that this Court properly overruled Claimant's exceptions to this libel with regard to the liability of Barge No. 8, Barge No. 9, and Barge No. 27, seeing that the evidence in this case was not at that time before this court. But it is submitted that, now that the testimony has all been taken, and the true nature of the "Samson's" relation to her tow is in evidence, Barge No. 8, Barge No. 9, and Barge No. 27 should be declared free from liability for this collision, and the libel as to them dismissed, no matter what may be the decision of this court with respect to the liability of the "Samson."

In *The James Gray v. The John Fraser*, cited above, Mr. Chief Justice Taney laid down the rule covering this class of case in language that has been frequently cited in the books:

"It is true that *The John Fraser* was the *res* or thing which struck *The James Gray* and did the damage, yet the mere fact that one vessel strikes and damages another does not of itself make her liable for the injury; the collision must in some degree be occasioned by her fault. A ship properly secured may, by the violence of a storm, be driven

from her moorings and forced against another vessel, in spite of her efforts to avoid it. Yet she certainly would not be liable for damages which it was not in her power to prevent. So also ships at sea, from storm or darkness of the weather, may come in collision with one another, without fault on either side; and in that case, each must bear its own loss, although one is much more injured than the other. \* \* \* And as this collision was forced upon *The John Fraser* by the controlling power and mismanageemnt of the steam-tug, and not by any fault or negligence on her part, she ought not to be answerable for the consequences." (L. C. P. Co. Ed., 110).

It should be noted that in the case of *The John Cooker* and *The James W. Eaton*, as in the case of *The Doris Eckhoff* (which latter case Mr. Spencer quotes at page 258 ff., as tending to contravene *Sturgis v. Boyer*) both cited above, the tow was attached to the tug by a hawser and being pulled along in the tug's wake. This method of towing naturally renders necessary some degree of skill on the part of those steering or towing. Consequently, it is only natural that the question of the tow's liability should frequently arise in cases similar to this; but the case at bar presents essentially different facts. No steering was done by the "Samson's" scows; the entire management and control of their movements lay with the "Samson." In such circumstances, it is hard to see how any blame for the accident can be attached to the scows as distinguished

from the "Samson." The case of *The J. H. Gautier* and *The Herbert Manton*, cited above, is peculiarly in point. In that case the owners of a canal boat, which was lashed to the port side of a steam tug, and which was sunk in a collision with a schooner, libelled both tug and the schooner; and it was held that, although for the purpose of construing the rules of navigation, the canal boat and the tug together were to be construed as one steam vessel, the tug was solely responsible for the collision, and the owners of the canal boat were entitled to recover against the owners of the tug.

In conclusion Claimant's position may be briefly summarized as follows:

According to Claimant's version of the accident, the "Samson" and her tow were in no way responsible; if, however, the Court finds itself unable to accept either version, the libel should be dismissed, both parties paying costs by them made; and in case the Court should accept Libellant's version, the damages should be divided; but the Court should recognize that the amount thereof claimed by the Libellant is far in excess of the true damage, and, in any event, the "Samson's" tow should not be held liable for any of it.

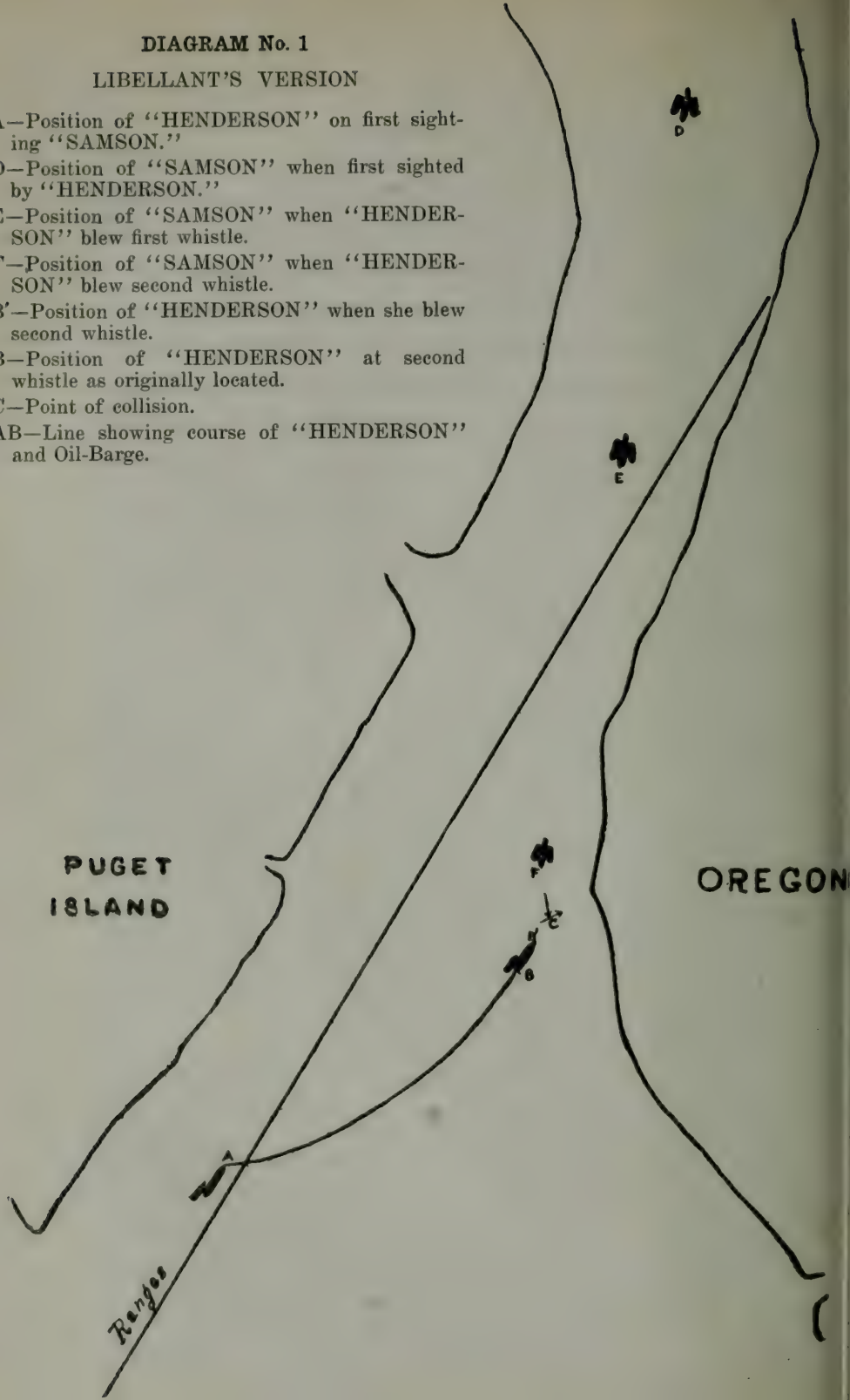
TEAL, MINOR & WINFREE,  
ROGERS MACVEAGH,

Proctors for Claimant.

# DIAGRAM No. 1

## LIBELLANT'S VERSION

- A—Position of "HENDERSON" on first sighting "SAMSON."
- D—Position of "SAMSON" when first sighted by "HENDERSON."
- E—Position of "SAMSON" when "HENDERSON" blew first whistle.
- F—Position of "SAMSON" when "HENDERSON" blew second whistle.
- B'—Position of "HENDERSON" when she blew second whistle.
- B—Position of "HENDERSON" at second whistle as originally located.
- C—Point of collision.
- AB—Line showing course of "HENDERSON" and Oil-Barge.





## DIAGRAM No. 2

### VARIATIONS IN TESTIMONY

A—"HENDERSON" when first sighted by "SAMSON."

A'—Former location of same by Capt. Sullivan.

G—"HENDERSON" at first whistle.

H—"HENDERSON" at second whistle.

B—Former location of same by Capt. Sullivan.

C—Point of collision (Capt. Sullivan).

D—"SAMSON" when first sighted by "HENDERSON."

E—"SAMSON" at first whistle.

F—"SAMSON" at second whistle, as first located by Capt. Sullivan.

F'—"SAMSON" at second whistle, as first corrected by Capt. Sullivan.

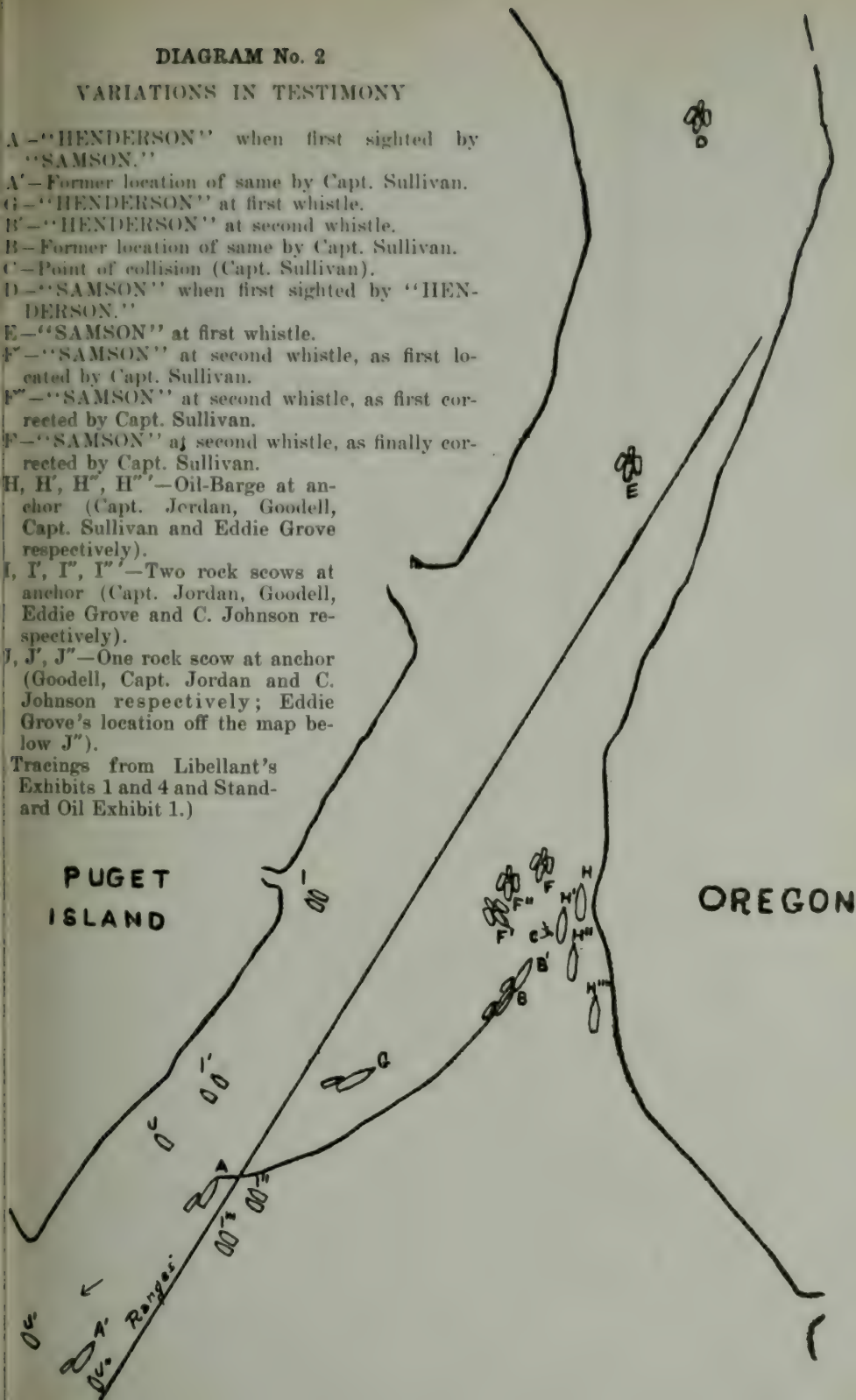
F"—"SAMSON" at second whistle, as finally corrected by Capt. Sullivan.

H, H', H'', H'''—Oil-Barge at anchor (Capt. Jordan, Goodell, Capt. Sullivan and Eddie Grove respectively).

I, I', I'', I'''—Two rock scows at anchor (Capt. Jordan, Goodell, Eddie Grove and C. Johnson respectively).

J, J', J''—One rock scow at anchor (Goodell, Capt. Jordan and C. Johnson respectively; Eddie Grove's location off the map below J'').

Tracings from Libellant's Exhibits 1 and 4 and Standard Oil Exhibit 1.)



### DIAGRAM No. 3

#### LIGHTS ON "SAMSON"

ARB—Length of "SAMSON," 110 ft. 4 in.

LM—Beam of "SAMSON," 25 ft. 4 in.

J—Port (red) light on "SAMSON."

K—Starboard (green) light on "SAMSON."

JK—16 ft. between lights, 36 ft. aft of "SAMSON'S" stem.

H I, D C, F G—Rock scows, 140 ft. long, 36 ft. beam.

N O—Stern of center scow, 50 ft. ahead of other scows.

ARB C D E—Mid-Ship's line of "SAMSON."

E—Point 400 ft. dead ahead of "SAMSON," where port and starboard lights are simultaneously visible.

J E—Line of port (red) light of "SAMSON."

K E—Line of starboard (green) light of "SAMSON."

$\angle J E R$ —Angle made by line of red light of "SAMSON" with Mid-Ship's line or course of "SAMSON" and tow.

(In rt. triangle J R E,  $\angle J E R : \angle E J R = 8 \text{ ft.} : 436 \text{ ft.}$  Therefore  $\angle J E R$  contains  $1.624^\circ$  or about  $1\frac{1}{2}^\circ$ .)

(Tracing from Libellant's Exhibit 1.)



# **DIAGRAM No. 4**

## **LIGHTS ON OIL-BARGE AND "HENDERSON"**

AB—Length of Oil-Barge,  
280 ft.

FE—Beam of Oil-Barge,  
45 ft. 4 in.

BAL—Mid-Ship's line of  
Oil-Barge.

CD—Length of "HENDERSON," 180 ft.

IJ—Beam of "HENDERSON," 35 ft.

DCK—Mid-Ship's line of "HENDER-  
SON."

CH—Half beam of "HENDERSON," 17  
ft. 6 in.

CG—Distance from stem of "HENDER-  
SON" to Oil-Barge, 14 ft. 6 in. (3 ft.  
nearer than if parallel).

L—Point 400 ft. dead ahead of Oil-Barge.

K—Point 400 ft. dead ahead of HEN-  
DERSON."

HKM—Line of port (red) light of "HENDERSON."

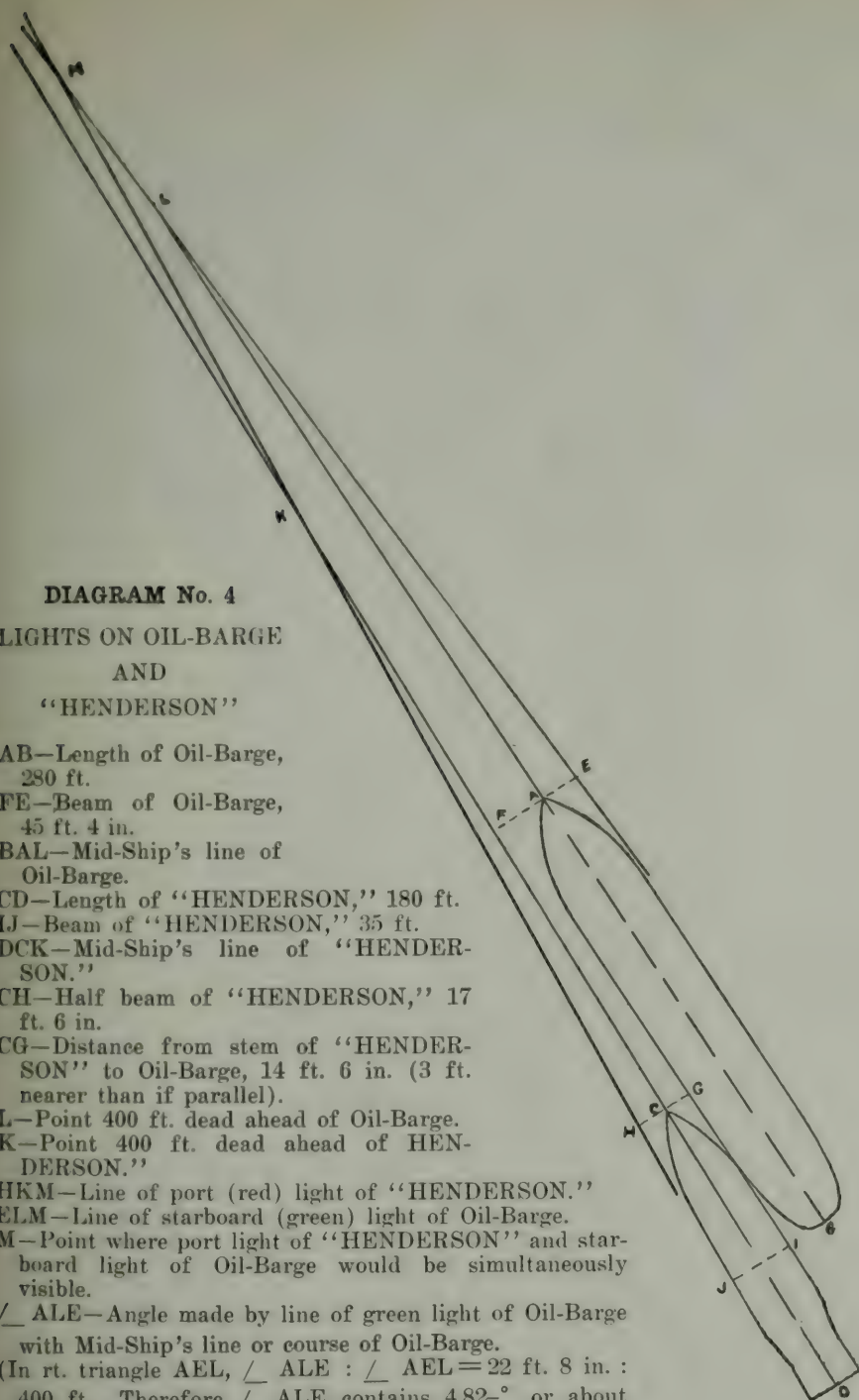
ELM—Line of starboard (green) light of Oil-Barge.

M—Point where port light of "HENDERSON" and star-  
board light of Oil-Barge would be simultaneously  
visible.

∠ ALE—Angle made by line of green light of Oil-Barge  
with Mid-Ship's line or course of Oil-Barge.

(In rt. triangle AEL, ∠ ALE : ∠ AEL = 22 ft. 8 in. :  
400 ft. Therefore ∠ ALE contains 4.82°, or about  
4¼°.)

(Tracing from Libellant's Exhibit 1.)



# DIAGRAM No. 5

## LIGHTS OF OIL-BARGE AND "SAMSON"

A—Oil-Barge when first sighted by "SAMSON."

B—Oil-Barge at second whistle.

C—Point of collision.

D—"SAMSON" when first sighted by Oil-Barge.

E—"SAMSON" at first whistle.

F—"SAMSON" at second whistle.

TVBS—Course of Oil-Barge furthest to port.

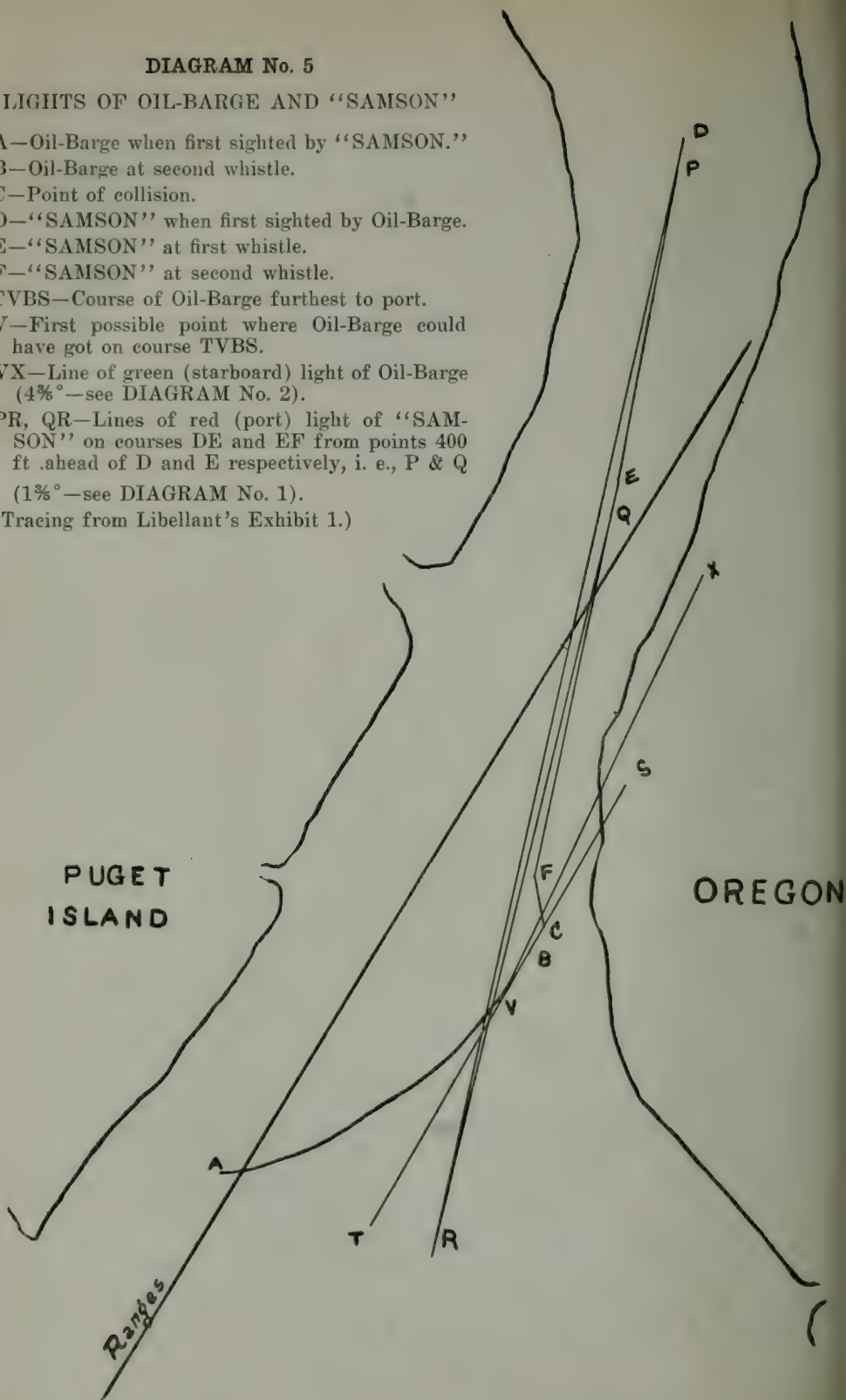
V—First possible point where Oil-Barge could have got on course TVBS.

VX—Line of green (starboard) light of Oil-Barge ( $4^{\circ}$ —see DIAGRAM No. 2).

PR, QR—Lines of red (port) light of "SAMSON" on courses DE and EF from points 400 ft. ahead of D and E respectively, i. e., P & Q

( $1^{\circ}$ —see DIAGRAM No. 1).

(Tracing from Libellant's Exhibit 1.)





**DIAGRAM No. 6**

**CLAIMANT'S VERSION**

A—Position of "HENDERSON" when first sighted by "SAMSON."

D—Position of "SAMSON" when first sighted by "HENDERSON."

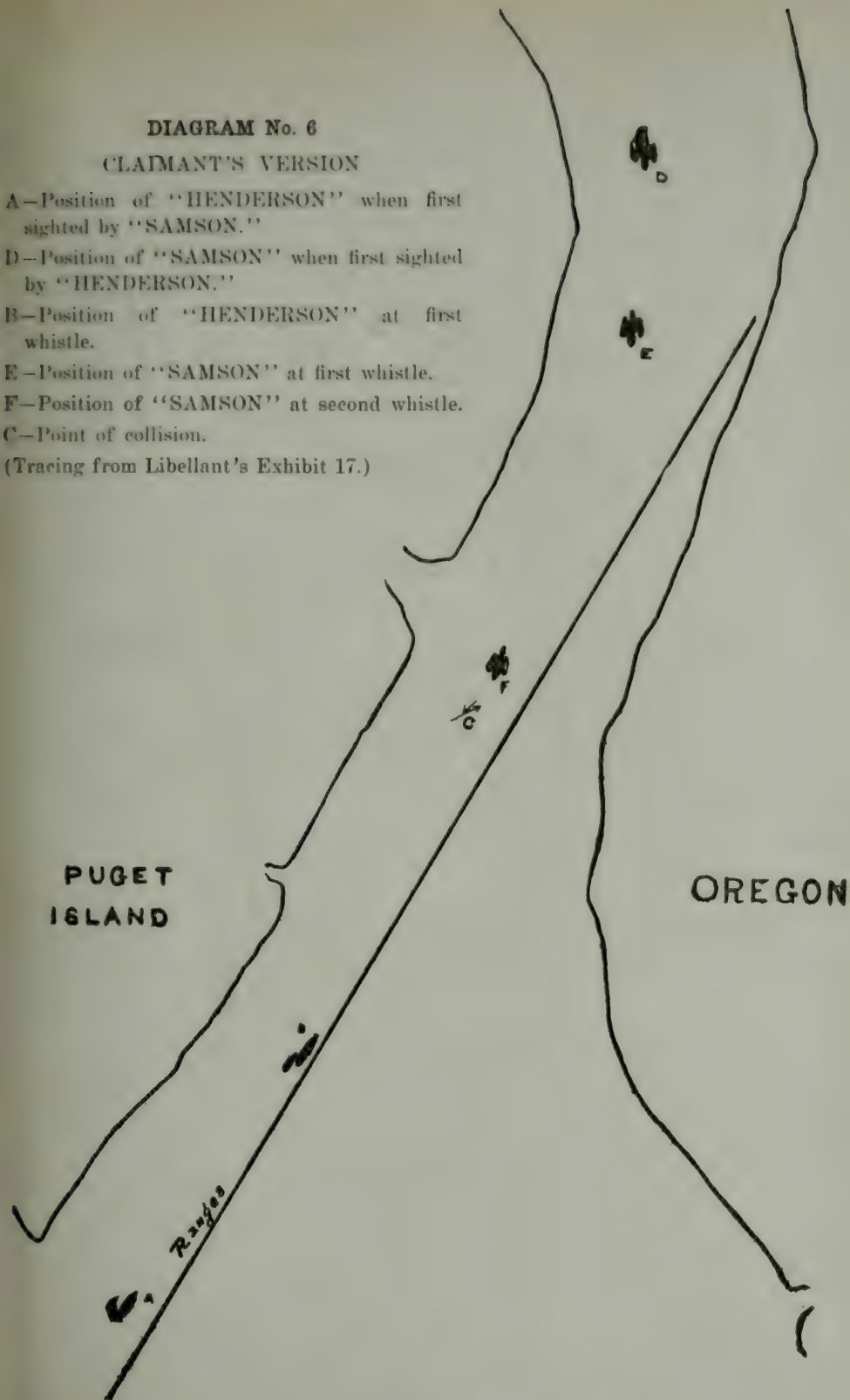
B—Position of "HENDERSON" at first whistle.

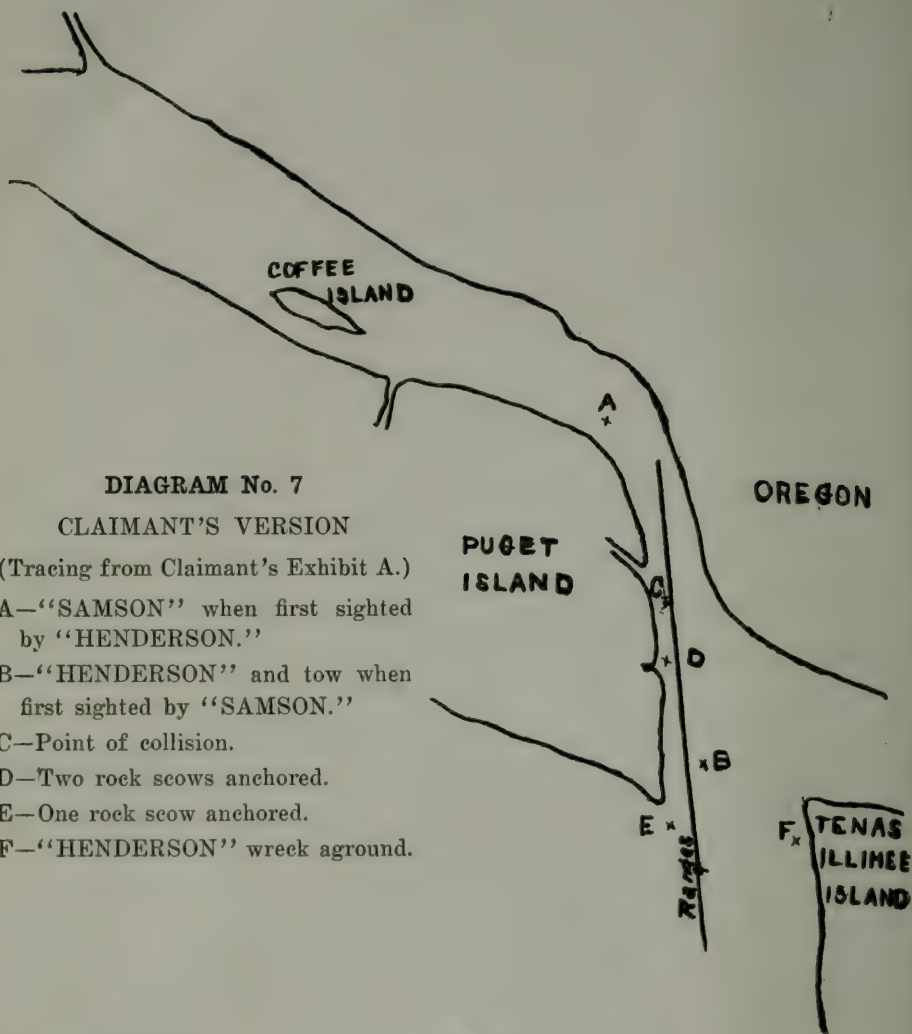
E—Position of "SAMSON" at first whistle.

F—Position of "SAMSON" at second whistle.

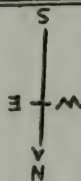
C—Point of collision.

(Tracing from Libellant's Exhibit 17.)

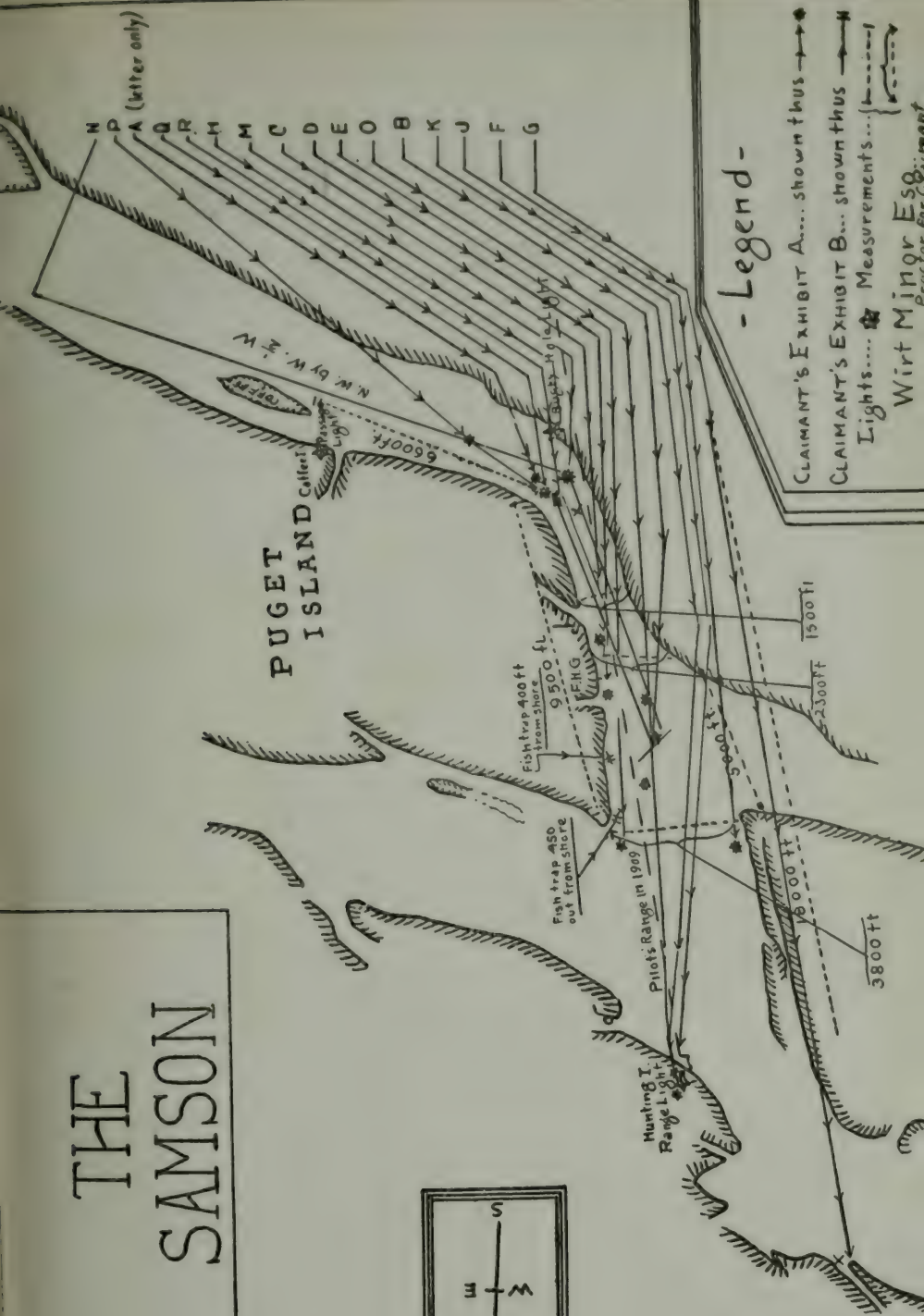




# THE SAMSON



## PUGET ISLAND



## - Legend -

CLAIMANT'S EXHIBIT A... shown thus →

CLAIMANT'S EXHIBIT B... shown thus →

Lights... ★ Measurements... {



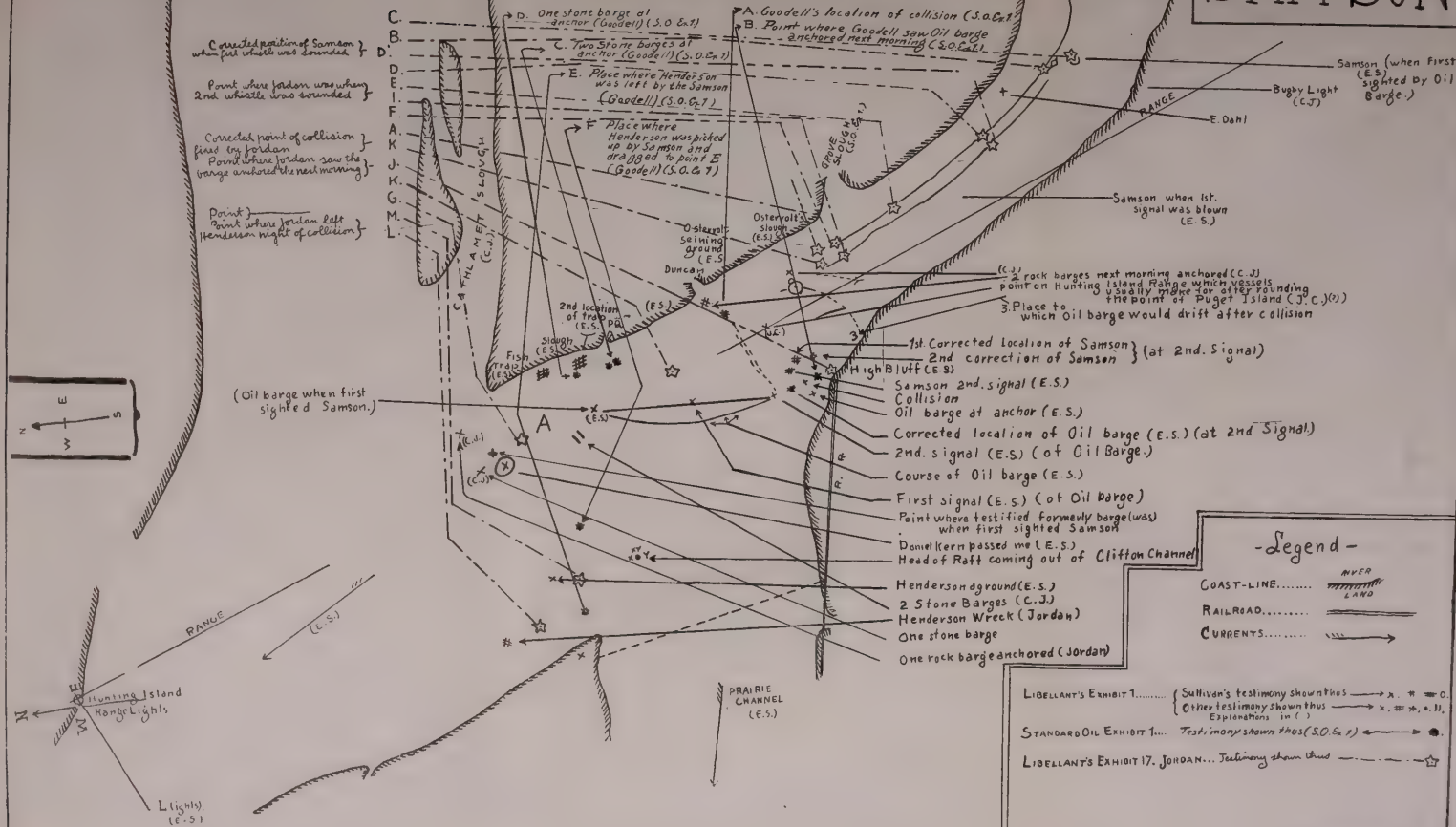


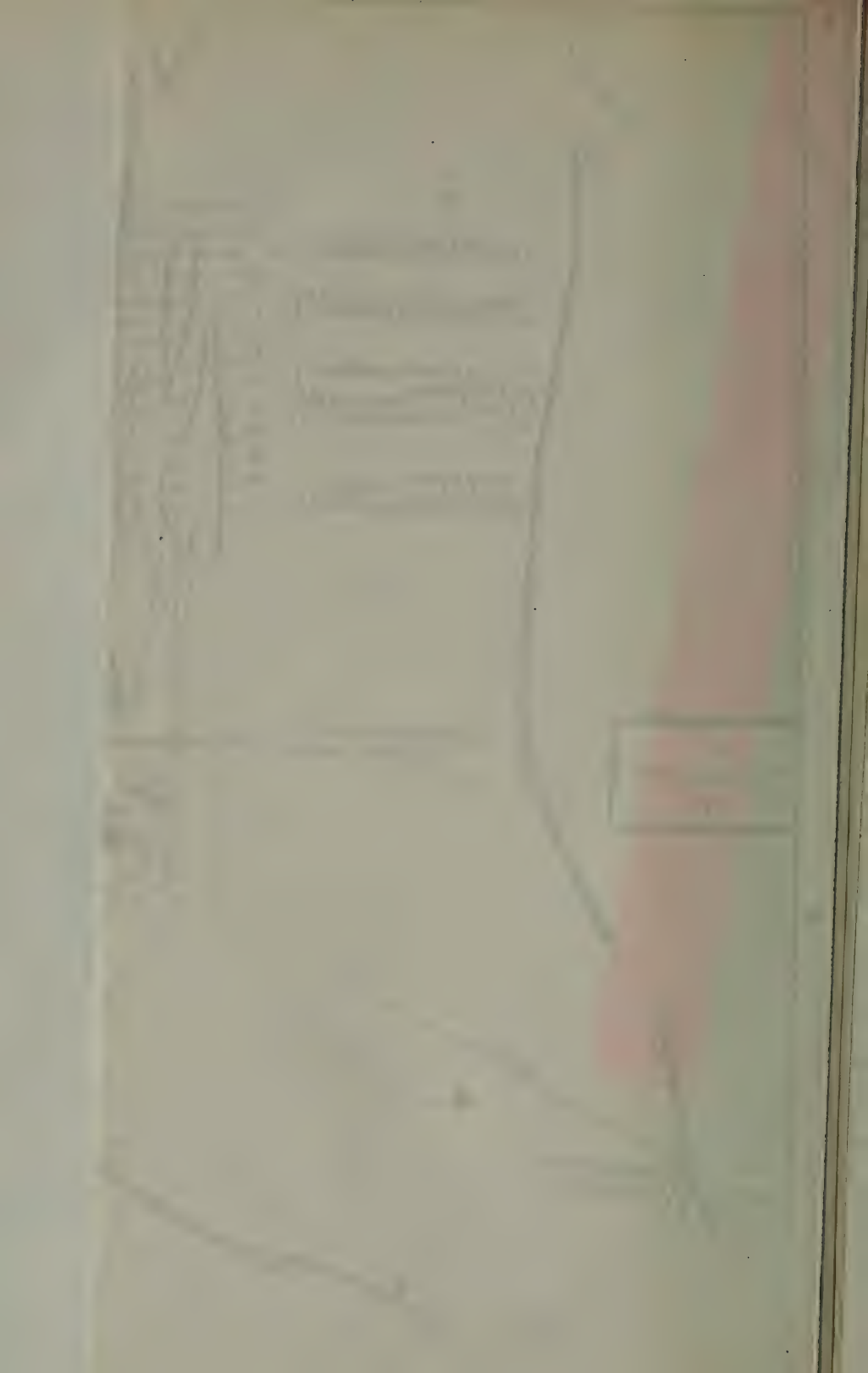




# PUGET ISLAND

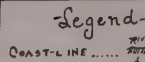
## THE SAMSON







# THE SAMSON



LIBELLANT'S EXHIBIT 2 SULLIVAN.....  
..... Testimony shown thus \_\_\_\_\_

LIBELLANT'S EXHIBIT 4 EDDIE GROVE ....  
..... Testimony shown thus \_\_\_\_\_ ◆

LIBELLANT'S EXHIBIT 5 OLE GROVE .....  
..... Testimony shown thus \_\_\_\_\_

LIBELLANT'S EXHIBIT 15 CAPT. J.W SHAVER....  
..... Testimony shown thus \_\_\_\_\_

WIRT MINOR, Esq.  
Proctor for Claimant.









IN  
**The United States Circuit  
Court of Appeals**  
Ninth Circuit

**THE STEAMER SAMSON, and BARGE No. 8,  
BARGE No. 9 and BARGE No. 27**

**COLUMBIA CONTRACT COMPANY,  
a Corporation**

**CLAIMANT AND APPELLANT**

**SHAVER TRANSPORTATION COMPANY,  
a Corporation**

**LIBELLANT AND APPELLEE**

**STANDARD OIL COMPANY OF CALIFORNIA,  
a Corporation**

**RESPONDENT IN PERSONAM**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON**

**Brief on Behalf of the Libellant  
and Appellee**

**C. E. S. WOOD  
ERSKINE WOOD**

**Proctors for Libellant and Appellee**

**WIRT MINOR and  
ROGERS MacVEAGH**

**Proctors for Appellant**

**ZERA SNOW and  
GEORGE B. GUTHRIE**

**Proctors for Standard Oil Co.**

**FILED**



**In the United States Circuit  
Court of Appeals**  
for the Ninth Circuit

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THE STEAMER SAMSON, and BARGE No. 8,  
BARGE No. 9 and BARGE No. 27

COLUMBIA CONTRACT COMPANY,  
a Corporation,  
*Claimant and Appellant.*

SHIAVER TRANSPORTATION COMPANY,  
a Corporation,  
*Libellant and Appellee.*

STANDARD OIL COMPANY OF CALIFORNIA,  
a Corporation,  
*Respondent in Personam.*

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**Brief on Behalf of the Libellant  
and Appellee**

---

*Appeal from the District Court of the United  
States for the District of Oregon.*

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**STATEMENT OF THE CASE**

This appeal arises out of the following facts:  
In July, 1911, the Standard Oil Company's tank

steamer Barge 93, an ocean-going barge of two hundred and eighty-four feet length and carrying twenty-five thousand barrels of oil, was ascending the Columbia River in the night time. The oil barge had no motive power of her own and was being towed by the libellant's river steamboat M. F. Henderson, a boat about one hundred and sixty feet long. The Henderson was lashed to the port quarter of the barge and was completely controlled by the employees of the Standard Oil Company on the oil barge. The Henderson was merely the propelling force. She was doing no steering. The officer in command of both boats was Pilot Sullivan on the fo'c'slehead of the oil barge and all steering was done by the oil barge. A pilot was in the pilot-house of the Henderson, but the helm of the Henderson was kept amidships except when ordered changed by Pilot Sullivan on the oil barge.

These two vessels proceeding upstream at a speed of about three miles an hour met the Columbia Contract Company's sea-going tug Samson with three rock barges in tow coming down the river. The Samson had the three rock barges in front of her, pushing them, and the center barge projected in front of the other two in what is known as a "spike tow." All were lashed together. These approaching vessels sighted each other a long distance apart, between one and two miles. The night was dark but



clear, no fog, and lights were easily discernible. The river at this point is about a half a mile wide with deep water practically from shore to shore. When the vessels were about a half a mile apart the oil barge blew one whistle, which was answered by the Samson, signifying a passage to port. The vessels continuing to approach each other, the oil barge blew another whistle, signifying her continued intention to keep the starboard hand and pass to port, but the evidence is conflicting whether this one was answered by the Samson or not. At any rate the collision occurred soon after and one or two of the rock barges (the evidence is conflicting) crushed into the port bow of the Henderson and sunk her almost immediately. The libellant and respondent, Standard Oil Company, claim that the collision took place close to the Oregon shore. The claimant insists that it took place close to the Puget Island, or Washington shore. This place of collision is a vital point in the case.

The Henderson was torn loose from the oil barge, sunk, and drifted down stream. The oil barge let go her anchors almost immediately, as we claim, but about three minutes after the collision, as claimed by the claimant. At any rate, when she swung to her anchors she was less than her own length from the Oregon shore, and we contend that this fixes the place of collision and the responsibility for the accident.

The Henderson, drifting down stream, came to her final lodgment at the head of Tenas Illihee

Island in twenty-seven feet of water at low tide, and after a good deal of trouble, due to the strong current and the fact that the boat was turned over more than on her beam end and had to be straightened up before she could be raised, was finally successfully raised by the libellant, towed to Portland and hauled out on the ways of a local shipyard, where she was surveyed and determined to be such a wreck that she could not be repaired. It cost to raise her and tow her to Portland between eight and nine thousand dollars. Her machinery was badly twisted and tangled, but was straightened out and eventually used in a new boat which the libellant built and named the Henderson, and which is sometimes referred to in this case as the new Henderson. The value of the machinery, boiler and iron work which made up the salvage of the wreck was \$16,835.00. About this there is no dispute.

The libellant, after investigating the circumstances, came to the conclusion that Pilot Sullivan of the Standard Oil Company, had acted properly and that the fault for the collision lay with the Samson and her barges. It therefore libeled the Samson and her barges, claiming a total loss. The claimant of the Samson and her barges (all of which belonged to the same corporation), in its answer alleged in effect that the fault lay with the oil barge. The libellant then, in order to bring all the parties before the court, filed a supplemental libel against the Samson and her

barges *in rem* and the Standard Oil Company *in personam*, and charged the Samson and her barges with being solely at fault but said that the Samson's answer sought to lay the blame on the oil barge and if the proof at the trial should support the contention of the Samson then the Standard Oil Company would be liable to the libellant for its damages, since the Standard Oil Company's pilot Sullivan had sole control of the libellant's boat. In other words, the libellant availed itself of the privilege given in admiralty of pleading hypothetically. The trial judge found the Samson and her barges solely at fault, and awarded the libellant \$30,870.75 damages, with interest and costs. The damages asked by the libellant are in round numbers about \$37,000.00. This sum with interest the libellant asks from the claimant Columbia Contract Company as being the one solely at fault. If, however, your Honors should believe that the Standard Oil Company was at fault and not the Samson then the libellant asks that it recover from the Standard Oil Company. It is entitled to recover from one or the other. The fact that it has not appealed from the decree does not preclude it from asking that the sum awarded by the decree be raised, *Irvine v. The Hesper*, 122 U. S. 256, 7 Sup. Ct. Rep. 1177; *The San Rafael*, 141 Fed. 275; nor from recovering against the Standard Oil Company should your Honors hold that company to have been in fault. *Hume v.*

Frenz, 150 Fed. 502, 504; The Galileo, 29 Fed. 538; The Umbria, 59 Fed. 489.

A word may be appropriate here in regard to the Hunting Island Range, for it appears constantly in the testimony. It is formed by two lights down the river two or three miles below the place of the collision. These lights were placed to mark a dredged channel across a sand bar below the foot of Puget Island, but by chance they also mark approximately the center of the channel further up the river, and are constantly used by the pilots in navigating this upper reach of the river abreast of Puget Island. According as a boat is one side or the other of this range, it may be said to be on one side or the other of the river in this upper reach, and consequently in locating the place of this collision the witnesses constantly refer to their boats as being on one side or the other of the range.

### **ARGUMENT**

**DECREE MUST BE AFFIRMED UNLESS  
CLEARLY AGAINST THE EVIDENCE.**

This appeal involves principally questions of fact. Appellant has a hard task. To win he must show that the decree is overborne by the heavy weight of the evidence. It will not do for him to show that the evidence is conflicting, and that his theory is reconcilable with one part of it. It will not even do for him to convince your honors that if you had been the triers of fact in



the first instance you might have decided differently from the trial court. The decree from which this appeal is taken comes here with the prestige of Judge Cushman's opinion behind it. Judge Cushman sat for a week and heard the witnesses testify and looked them in the face and questioned them himself. Only part of the rebuttal and the evidence as to the amount of damages was taken by deposition. For one whole week Judge Cushman listened to the testimony on the main question of liability. To set aside the decree he rendered, your Honors must be convinced from the cold bare words of the printed record that his decision was clearly against the great weight of the evidence. This is the well-settled rule in admiralty appeals, and appellant must face it all through this case.

*Spencer v. The Dalles P. & A. Navigation Co.*, 188 Fed. R. 865, C. C. A. Ninth Circuit, 1911.

*The J. G. Gilchrist*, 183 Fed. R. 105, C. C. A. Second Circuit, 1910.

*Cooper v. The Saratoga*, 40 Fed. R. 509, Cir. Ct. S. D. New York, 1889.

On page 2 of their brief appellant's proctors admit that the evidence in this case is not only conflicting, but irreconcilable. '

We do not rest on this principle alone, however, but contend that the EVIDENCE IS OVERWHELMING AGAINST THE APPELLANT. We

shall analyze it as briefly as is consistent with its great volume and the necessity of pointing out its decisive features.

### THE LOCATION OF THE OIL BARGE 93 AT ANCHOR AFTER THE COLLISION SHOWS WHO WAS AT FAULT.

Appellant claims that the Samson and barges were coming down the river on their own righthand side, close to the Puget Island shore, where they should have been according to the whistles which had been exchanged, but that the Henderson and oil barge, instead of keeping to their righthand side as agreed, wrongfully steamed up the side which had been assigned by the whistles to the Samson and barges, and that the collision occurred on that side, and consequently the fault was that of the oil barge and Henderson.

We claim, on the other hand, that the oil barge and Henderson, coming upstream, kept well over to their own righthand side, in obedience to the whistles, but that the Samson and barges, instead of conforming to those whistles, kept crowding the oil barge and Henderson toward the Oregon shore until there was actually danger of going aground, that the collision occurred close in toward the Oregon shore under what is known as Bugby's Bluff, and consequently the blame must rest entirely on the Samson and her barges.

The place of collision is a vital point. Where that place was is best determined by the position of the oil barge at anchor immediately after the collision. It is admitted that when she lay at anchor she was very close to the Oregon shore—from 150 to 300 feet from the beach. She was going slowly at the time of collision. Her anchors were down within thirty seconds after the crash. She was a helpless floating mass, without motive power after the Henderson was torn away, and it was vital to get her under control quickly. The only way to do it was to get her anchors down immediately. And it was done in thirty seconds. The bottom was good holding ground, the anchors weighed 7,000 and 6,300 pounds, respectively, and she did not drag them. When daylight came she was found to be almost on the Oregon beach. That shows where the collision occurred and should end this case right here.

The foregoing facts were faintly disputed, but a reading of the record will show that they were practically uncontroverted.

Sullivan, the pilot of the oil barge, had ordered the boatswain to stand by the anchors before the collision, ready to let go. His thought was, that even if a collision were avoided, he would be so close inshore that he would have to use the anchors to keep from going aground. At the moment of collision he ordered the anchors let go. They are held on a compression

gear which is instantly released by a turn of a wheel, and were let go thirty seconds after the boats crashed together.

(Sullivan. Apostles, pp. 109-111.)

Alexander Martinson was the man who let the anchors go. He testified as follows (Apostles, pp. 112-115):

"Q. Mr. Martinson, what is your business?

"A. I am boatswain.

"Q. I didn't understand you.

"A. I say I was boatswain.

"Q. What is your regular business now?

"A. Sailor.

"Q. How long have you been a sailor?

"A. About for 30 years.

"Q. In what parts of the world?

"A. All parts of the world.

"Q. Were you on Oil Barge 93 at the time of the collision with the Samson and her rock barges?

"A. Yes, sir.

"Q. What position were you in then?

"A. I was boatswain at the time.

"Q. Where were you on the oil barge?

"A. I was on the forecastle head—forecastle head.

"Q. What were your duties there

"A. Well, I was assisting the pilot. I was keeping look-out, you know, along with the pilot.



"Q. How long had you been on watch—do you remember?

"A. Just about an hour and a half. I came on watch at 12 o'clock.

"Q. What orders did you get from Captain Sullivan about letting go the anchors of the barge?

"A. Well, the only thing what I remember, that is when he sung out 'Let go the anchor,' and I let these anchors go. That is all I can remember. That is a long time ago.

"Q. Well, tell me what you did, how you let go the anchors.

"A. Well, there is just a round wheel you have, kind of compression, and you just open that up a little bit and the anchor goes right down.

"Q. Where were you when he sung out to let go the anchor?

"A. Well, I was about amidships; about 40 feet away somewhere, from the anchor.

"Q. About 40 feet away from the anchors?

"A. Yes, about 40 feet away at the time he sung out.

"Q. And what deck were you on?

"A. On the main deck at the time.

"Q. How did you happen to be on the main deck? That wasn't your regular position, was it?

"A. No, sir, but when I saw there was going to be a collision I went off the forecastle head,

and went down on the main deck, and I had in my mind to go and close those water-tight doors.

“Q. How quickly did you let go the anchors in regard to the time of the collision?

“A. That is only a matter of second, you know. About 20 or 30 seconds, something like that; only made a couple of jumps and I was right there, and opened up and the anchors went right down. That is only a matter of a few seconds.

“Q. How many anchors did you let go?

“A. Let go first the starboard, then I went over to the other side, the port, afterwards.

“Q. How did they go out—fast or slow?

“A. Well, they go out fast, you know; when we open up, they go out fast.

“Q. And after the anchors hit the bottom, how do the chains go out?

“A. That depends on the headway of the ship. If the ship's got much headway, go fast. If the ship got slow headway, go slower.

“Q. How did they go this night?

“A. Slow.

“Q. This night, after the anchors hit the bottom, the chains went out slow—is that right?

“A. Yes, sir.

“Q. Did the oil barge have much headway that night, at this time—at the time you let go the anchor?

"A. I don't think so. Very little headway.

"Q. Do you know how much anchor chain you had out?

"A. I couldn't tell. I don't know.

"Q. Where was the barge in relation to the shore, when she lay at anchor—when daylight came?

"A. Was pretty close on the Oregon shore.

"Q. About how close?

"A. Well, I couldn't tell you exactly the distance, but I don't think there was room enough for a barge to swing without touching the shore, in my estimation.

"Q. You mean she would be less than her own length from the shore?

"A. Yes, I think something like that, because I don't think there was room enough to swing.

"Q. Had she moved any from the time the anchors held her, after the collision, until the next morning?

"A. No, sir, she hasn't moved any."

Charles Kayser, a young sailor who had been asleep in his little stateroom on the starboard side of the foc'sle, a few feet from the anchor gear, was wakened by the crash of the collision, and saw Martinson leap to the anchors and let them go. He testified as follows (Apostles, pp. 133-135):

"Q. What is your occupation?

"A. A seaman.

"Q. How long have you been a seaman?

"A. About 12 years.

"Q. How long have you been on the oil barge?

"A. Twenty months now.

"Q. You were on her at the time of this collision with the Samson?

"A. Yes, sir.

"Q. Where were you on the oil barge at the time of the collision?

"A. In my bed.

"Q. What woke you up if you were asleep?

"A. The crash of the Samson running into the Henderson.

"Q. Had you heard anything else before that?

"A. I heard our whistles. I heard one whistle and then fell asleep again, and heard another whistle shortly after that. I fell asleep again after the second whistle.

"Q. You were just half asleep there?

"A. Yes.

"Q. And the crash woke you up?

"A. Yes.

"Q. Then what did you do?

"A. I jumped out of bed, half undressed and run up on deck. I thought we were on the rocks or something, and when I was running out, Martinson came running in, and we ran



to the anchors, and I asked what was the matter, and he didn't answer me. Just went for the anchor and let go the starboard anchor and then the port, before I saw the Henderson drifting to stern, she was sinking.

"Q. How far had you run from your bunk to where you met Martinson?

"A. About 18 or 20 feet.

"Q. And Martinson was running in? Is that it?

"A. Yes.

"Q. How soon would you say it was the anchors were let go after the collision?

"A. Oh, it was only a matter of seconds. Just the time it took me to run out from my bunk, to run these twenty feet and for Martinson to run for the anchors.

"Q. How far did he run to the anchors from the point you met him?

"A. Probably 25 feet.

"Q. How did the oil barge come up on her anchor chains?

"A. Very slow. I noticed that when the starboard anchor was down, I could just watch the chain going out. I think Martinson left the brake open, and the chains could hardly go out any more.

"Q. Hardly go out any more after the anchor hit the bottom?

"A. After the anchor was on the bottom."

Wm. Kalberg was the helmsman at the wheel in the little wheel-house on the fo'c'sledeck directly over the anchor gear in the fo'c'sle beneath. He, of course, had his attention riveted on his wheel, but he heard the order to let go anchors and heard them go. He says (Apostles, p. 2022):

“Q. Did you hear any orders given?

“A. Oh, yes. Captain Sullivan says to drop the anchors instantly, and that was what was done, too.

“Q. How do you know?

“A. I could hear it. That is why.

“Q. How long after the collision were the anchors let go?

“A. Well, the time was so short, you know, they may not have been a half minute and they may have been a minute; but I am satisfied it was no more.”

Captain Sorley was master of the oil barge. He came on deck in his underclothes a few seconds after the collision. He testified (Apostles, 2039-2040):

“Q. Now, as soon as you got on deck that night what did you do with reference to giving any order to let go of the anchors?

“A. I immediately told them to let go of the anchors.

“Q. And did you hear anybody else give any order to let go of the anchor on the barge?

"A. That order was given forward about the same time.

"Q. What sort of anchors was the barge equipped with?

"A. Patent anchors.

"Q. And how soon can they be let go after an order to let go is given?

"A. Oh, if you are on hand it is only a matter of a second or two—less than that.

"Q. How soon, in fact, were the anchors let go that evening after the order was given to let them go?

"A. Oh, a few seconds; probably four or five seconds; it could not be any more.

"Q. What has to be done in order to let go of the anchor; in order for the anchor to pay out?

"A. Just simply pull the lever over.

"Q. How soon would you say the anchor was let go after the order was given?

"A. Just a matter of a few seconds, possibly ten seconds altogether."

Phil Crossen was a deckhand or watchman on the Henderson. Counsel, on pages 21 and 58 of their brief, evidently think he was a lookout and blame him for having been in the galley of the Henderson shortly before the collision, and for having paid no attention to the lights on the Samson and her tow (counsel by inadvertence say Henderson and her tow), and for not knowing where he was in the river. This arises from

a misapprehension of his duties. A "watchman" on a river boat is not a lookout. He is a night deckhand. He is a general handy man around the boat to do whatever may be necessary—wake the men for their different watches, run an errand to the pilot house—anything. On freight boats he also has charge of the freight, and this is probably where he gets his name of "watchman." Crossen himself, if any testimony were needed, makes it evident he was not a lookout. He says he was "deck boy, deckhand, so far." Apostles, p. 1228. With this slight digression, we return to the subject of the anchors.

When the Henderson was torn away by the collision Crossen leaped upon the oil barge and was on her when she anchored. He testified as follows (Apostles, pp. 1231-1232):

"Q. Were you on the oil barge when she anchored?

"A. Yes, sir.

"Q. Did you see them anchor?

"A. I heard them anchor; I didn't see them.

"Q. Where were you standing on the oil barge when she anchored?

"A. On her stern.

"Q. And what did you hear?

"A. I heard the chains going down, I heard the hawsers.

"Q. How long after you got aboard of her did this occur?



"A. Dropping anchor?

"Q. Yes.

"A. It wasn't half a minute.

"Q. She dropped the anchor pretty much about a half a minute after you got aboard of her?

"A. Yes, sir, I should judge about that.

"Q. And how long did she go on her anchors before she came up on them?

"A. I don't think she went very far, because we were backing up for about a minute, I guess, before the collision, to my knowledge. Then when they hit, then it was quite awhile before the lines parted. I don't think she went the length of herself, the oil barge; because I looked out. I wanted to see where we were. After the Henderson broke loose I wanted to see where we was, and we were drifting down stream.

"Q. The oil barge?

"A. Yes, sir. It wasn't going up stream at all.

"Q. How far were you from the Oregon shore?

"A. About one hundred and fifty or two hundred feet, I should judge.

"Q. And you could see the outlines of the shore?

"A. Yes, sir."

All of this testimony of men who were right on the scene of action is corroborated by the

fishermen who were drifting on the river that night, and heard the anchor chains rattling through the hawse-pipes, and are independent witnesses uninterested one way or another in the result of this case.

Eddie Grove, a fisherman, said (Apostles, p. 292):

“Q. Did you hear any anchor chains going out?

“A. I heard anchor chains go right after the crash.

“Q. How did it seem to you that these danger whistles were blown? A long or short time or what time before the collision?

“A. Oh, it was all at the same time; first the whistles, then the crash, then the anchor, right after it.

“Q. Then the anchor, did you say?

“A. Last, yes.”

Martin Loaland, his fishing partner, said (Apostles, pp. 335-336):

“Q. Did you hear the collision?

“A. Yes, sir.

“Q. You heard the boats come together?

“A. Yes, sir.

“Q. Did you hear anything more?

“A. I heard a big noise.

“Q. A big noise.

“A. Yes.

“Q. Did you hear the anchor chains?

"A. Yes, sir; Eddie says—

"Q. Then what happened? What did Eddie say?

"A. I asked Eddie what that noise is. He said account of anchor chains go out.

"Q. And how soon was that after the collision?

"A. Just the same time.

"Q. You say that the danger whistles and the collision and the anchor chains were all very close together?

"A. Yes, sir."

Elias Dahl, another fisherman, said (Apostles, p. 358):

"Q. Did you hear the anchor chains that have been spoken of?

"A. Yes.

"Q. How long after the crash of the collision did the anchor chains go out?

"A. I don't know. All together. All at once. The whistles and the crash and the anchor chains, all together."

His fishing partner, Ole Grove, said (Apostles, p. 424):

"Q. How long after the collision did you hear these anchor chains you spoke of?

"A. They was just about the same time."

Against this overwhelming mass of testimony about the anchors there is practically nothing.

Most of the crew of the Samson testified that they did not hear the anchor chains of the oil barge, and from this counsel attempts to draw the inference that the anchor chains did not go out soon after the collision. It is noteworthy that the men who so testified were men who were stationed in enclosed places like the engine room, or else were men who had just been awakened out of a sound sleep, and rushed on deck. Is it strange that in the confusion of a collision these men heard no anchor chains on the oil barge?—especially since the Samson had gone on down stream. Pilot Jordan says he heard the anchor chains about three minutes after the collision, but admits he had no reason to fix the time. "That was just my notion of it," he said (Apostles, p. 715). Peterson, the helmsman, the only other man beside Jordan who was in a position to hear, was not asked about the chains. Appellant tried to show on the trial that the oil barge was going faster than we said and, under her headway, after the Henderson was torn loose, would drift between a quarter and a half mile *upstream* and athwart the current in a strong June freshet, before her anchors were down; also that the backing of the Henderson before the collision, and the impact of the Samson, and consequent snapping of all the tow lines holding the Henderson and oil barge together, would have no retarding effect on the headway of the oil barge; also that the oil barge anchors would drag on the bottom, al-



though it is uncontradicted that this was a good and often used anchorage ground.

As to all these things we are content to let your Honors read the record and reach your own conclusion without argument; calling attention, however, upon the question of the speed of the oil barge, that Peterson, the Samson's helmsman, testified that the oil barge went by "slowly, very slow." (Apostles, p. 1214.)

### THE POSITION OF THE HENDERSON ALSO INDICATES THAT THE COLLISION WAS ON THE OREGON SIDE.

The Henderson was a helpless wreck from the moment of the collision. With a hole in her side 40 feet long, her steam pipes broken and power gone, she filled immediately, turned on her side and sank—not, however, to the bottom. She floated, submerged, a little of her side being above water. This helpless waterlogged wreck drifted down stream and brought up on the point of Tenas Illihee Island, on the *Oregon* side of the river. Her position is admitted by all. The testimony is overwhelming that it would have been impossible for her to get where she did, had the collision been where the Samson claims it was. We refer to the testimony of the fishermen particularly. On the other hand, they all say that if the collision took place where we say it did—close to Bugby Bluff—the Henderson drifting from

that point would have brought up exactly where she did.

Ostervolt, Apostles, pp. 1254-1256.

Johnson, Apostles, p. 1309.

Ole Grove, Apostles, pp. 1312-1313.

Eddie Grove, Apostles, pp. 327-329.

Martin Loaland, Apostles, pp. 339.

Elias Dahl, Apostles, pp. 361-363.

Charlie Johnson, Apostles, pp. 392-393.

Ole Grove, Apostles, pp. 428-429, 434.

These men are all fishermen who drift their salmon nets at this point year in and year out and should know the currents if anyone does, and are independent witnesses. The testimony of the river captains and pilots, Moran, Shaver, Smith, Pease, supports them. (Apostles. pp. 1180-1182, 1333-13337, 1409-1412, 1430-1431.)

Three of these pilots are independent witnesses, unless it can be claimed that because they belong to the same Pilots' Association that Sullivan does renders them biased. They are in marked contrast to those pilots who contradict them, every one of whom is an employee of the claimant.

Claimant has tried to offset their mass of testimony by showing from testimony of its employees that there is a side suck of the current from the river into Clifton Channel, and that this would draw the Henderson from Puget Island (where the Samson claims the collision was) over to Tenas Illihee Island, where the wreck of the

Henderson was found. But, as Judge Cushman pointed out in his opinion, common sense is against this. The river at this point is 40 to 60 feet deep—Clifton Channel is 12 or 14. It needs no argument to show that the water would follow the deep main channel and not go off at a tangent down a shallow slough. This court could hardly accept that theory even if it was not overwhelmed by the mass of testimony we have brought against it.

But, appellant says, the Samson took hold of the wreck of the Henderson and nosed and pushed her over to the Tenas Illihee shoals; that is how she got there. This shows to what extremes appellant is driven. Their own captain, Jordan himself, testified that any pushing the Samson did on the Henderson was futile; that they did not move her.

After having located the position of the wreck of the Henderson, after the Samson left her, as a point "L" on the chart, he testified as follows (Apostles, pp. 718-719):

"Q. Now, then the collision occurred at where you have marked the point "K" as the corrected point of the collision. The Henderson if she had no power, if her steam pipes were broken, must have drifted with the current, and she drifted over practically to the point "L," did she?

"A. Yes, sir.

“Q. Where did you haul her from the point “L”?”

“A. Well, as I have testified before, we didn't do much hauling on her. We had a line on her. I don't suppose we backed up more than once or twice; only for a short time. The little backing we did, didn't have much effect on her.

“Q. You were practically drifting to point “L”?”

“A. Yes, sir.

“Q. You say she drifted with the current from the point of the collision across this deep water and down to the point “L”?”

“A. Yes, sir.

“Q. Then according to your theory the currents on that river or the currents from the Grove Slough make off towards Tenas Illihee Island?

“A. Yes, sir.

“Q. Now, your theory is then that she drifted from the point “K” or the point “A,” I don't care which, wherever the point of collision was, down to the point “L,” with the current setting toward Tenas Illihee Island?

“A. Yes, sir.

“Q. You didn't help her going to the point “L,” did you?

“A. What little help we did would not have had any effect on her, I don't think.”



## THE POSITION OF THE ROCK BARGES DOES NOT CONTRADICT US.

Appellant lays great stress on the position of the rock barges as they lay at anchor after the collision. Counsel says that they were lying at the lower end of Puget Island, close to shore, and this shows that the collision must have occurred on that side. Not at all. In the first place it must be noted that it is very doubtful if the position of these barges was as close inshore as counsel would have us believe. The fishermen were the best of all people to know how these barges lay at anchor, because, as anchored, they interfered with the drifting of the nets. The fishermen thus had a special reason for noticing and marking the position. Some went right up alongside the barges at anchor. They all say that at least two of the barges were *anchored on the Oregon side of the Hunting Island Range*, i. e., on the Oregon side of the channel. Eddie Grove, Apostles, pp. 293-295; Loaland, Apostles, pp. 336-338; Dahl, pp. 359-360; Johnson, pp. 410-413; Ole Grove, Apostles, p. 473.

But even conceding counsel's location, for the sake of argument, there is nothing in that location that contradicts our case in the least. The Samson, with her barges, was coming down the river at a speed of at least seven miles an hour. That is admitted. It was in the June freshet, the tide ebbing and the current very strong. The Samson was only backing about 30 seconds be-

fore the collision. This could check but very little the momentum of herself and three barges, each loaded with 1000 tons of rock. When she struck the Henderson she was on a hard aport helm, swinging to starboard—toward Puget Island. All these facts are admitted. Under these circumstances it is very easy to account for the barges going from Hunts Mill Point to the foot of Puget Island. Their momentum and the starboard swing they had and the current would put them there. Counsel says they had no rudders and, when loosened from the Samson by the force of the collision, they would lose the effect of the starboard swing. He tries to put them in the same category as the Henderson—a helpless piece of drift from the moment of the collision. This is not the case. Even if they had been torn loose from the Samson, and even though without rudders, nevertheless they had acquired the starboard swing—they had already felt the influence of the Samson's rudders and had entered on the swing before the collision occurred. And we do not see how they would lose it. If we have learned anything from physics, the moving inertia of their mass would continue on the swing they were on when abandoned. But as a matter of fact they were *not torn loose from the Samson. Not even the port barge was torn loose from the Samson.* (Jordan, Apostles, pp. 604 and 723.) *She hung onto them for ten to fifteen minutes* (Jordan, Apostles, p. 681) *and anchored them at a*

*place of her own choosing before she went back to the Henderson.* (Jordan, Apostles, p. 634; Church, Apostles, p. 1071.) They were not helpless drift like the Henderson at all. The only piece of drift that was started from the point of collision, and, the plaything of the currents, followed them wherever they went, was the Henderson. She was as good as a piece of wood thrown overboard at the time of collision to mark, by its drift and ultimate lodgement, the place where the vessels collided, and her lodgement on Tenas Illikee is silent evidence of where the collision was. Among the conflicting mass of human testimony warped by the interest of the tellers, or faulty through lack of memory or inaccurate powers of observation, the wreck of the Henderson is a mute witness pointing to the truth.

#### THE HOLE IN THE HENDERSON'S PORT SIDE IS ANOTHER SILENT WITNESS.

The Henderson was rammed on the port side. This shows she was trying to escape the oncoming Samson by hauling off to the right. It is conceivable, of course, that she could have been so struck had she been over on the Puget Island side, but it is not probable. If, as appellant contends, the Henderson and oil barge had been coming up Puget Island shore and the Samson and barges had been going down that shore, they would likely have met head on, for there would not be

room for a vessel the size of the oil barge, and drawing 20 feet of water, to come along close to and parallel with the Puget Island shore and then suddenly veer off to the right, so that the Henderson could catch the blow on the port side. Vessels of that size turn on a long curve. They don't handle like tugs. It is much more likely that the Henderson and oil barge had hauled off to the right of the river and were continuing to haul further off and thus exposed their port side to the oncoming Samson.

This hole in the port side of the Henderson is especially inconsistent with appellant's claim because it is a part of their testimony that the Samson and barges were going downstream broad-side and headed toward the Puget Island beach at the time of collision. (Jordan, Apostles, pp. 658, 714.) If they were so headed, then the oil barge and Henderson would actually have to be coming out of one of the sloughs on Puget Island and heading straight across the river, or even downstream, in order to catch the blow on the port side.

So far we have considered the silent evidence of the collision—the anchorage of the oil barge, the lodgement of the wreck of the Henderson, the hole in her port side. Counsel may object to our calling the anchorage of the oil barge silent evidence because it is not independent of oral testimony. Oral testimony is required to show the speed with which the anchors were dropped and



that the vessel could not travel far between the collision and the anchorage. But we consider the testimony and the inherent probability so overwhelming in favor of these facts that they must be accepted as established. And given them as established, then the place of anchorage of the oil barge becomes the strongest mute evidence of where the collision took place.

### THE ORAL TESTIMONY.

Eight men, Sullivan, Kahlberg, Martinson, Stayton, Eddie Grove, Loaland, Dahl and Ole Grove, observed the course of the Henderson and oil barge prior to the collision and all unite that they left the Hunting Island Range and hauled well over toward the Oregon shore, heading toward Hunt's Mill Point and giving the Samson plenty of room. Every one of these men had some reason for noticing the course. Sullivan, Kahlberg and Martinson were on the oil barge in charge of her navigation. Stayton was on duty in the pilot-house of the Henderson and noticed Sullivan's course, and remembered it because he thought at the time that Sullivan was getting dangerously close to the shoals near the entrance of Clifton Channel (Apostles, p. 490). These were all men on the boats. The others were fishermen. Eddie Grove, like Stayton, noticed the course because of its near approach to the shoal water on the Oregon side. (Apostles, pp. 289-90.) So did Loaland (Apostles, pp. 333-34). Dahl noticed it

too, though he does not say why (Apostles, p. 357). Ole Grove noticed it because he observed the oil barge and Henderson swing to the left a trifle to pass his son Eddie and then swing back and head for Bugby Bluff, and the failure of the Samson to answer the second whistle of the oil barge attracted his attention to the position of the boats (Apostles, pp. 420-422).

The testimony of all these men is that they observed the course of the boats as above described, and that they actually saw the collision take place close to the Oregon shore at Hunt's Mill Point. They were *eye witnesses* to the collision, and four of them independent witnesses.

The nearness of the Oregon shore is shown by the apprehension of those navigating the oil barge that she would run aground. Sullivan makes it plain that the reason he ordered Martinson to stand by to let go the anchors was that, though he believed the Samson would still pass if she took the proper measures, yet she had crowded him so close to the Oregon shore that he was afraid he would have to drop his anchors, after the passage was effected, to keep from going aground. (Apostles, pp. 108-111.)

Martinson said (Apostles, p. 116):

"Q. Do you remember how your oil barge was headed after the order to put the oil barge hard aport?

"A. Was headed to the Oregon shore, right in, right for shore.

"Q. How far away did the shore seem to be?

"A. Well, it was dark. I thought we was on shore already, the way it looked to me in the dark.

"Q. You thought you were getting too close to shore?

"A. Yes, I thought we were on shore already, the way it looked to me."

Kahlberg said (Apostles, p. 2024):

"Q. Were you in any fear about going ashore that night, about running ashore?

"A. I thought sure we was going ashore.

"Q. Why?

"A. I was bearing right in on the bank then, right in on the beach.

"Q. Well, if the anchors had not been let go would you have gone ashore, in your opinion?

"A. In my opinion, yes; that would be all right."

We have, then, the testimony of eight men who actually saw the collision and place it at Hunt's Mill Point on the Oregon shore. Four of these are men who were on the boats themselves. Four are fishermen.

Opposed to these are only two men who say they observed the courses of the boats and saw

the collision and place it near Puget Island. One is Pilot Jordan of the *Samson*—the man on trial, as it were. The other is his helmsman, Peterson. Jordan did not tell the truth. His testimony is riddled with contradictions and impossibilities. Peterson we never had a chance to cross-examine. He did not testify in person at the trial, but by stipulation his testimony before the U. S. Inspectors was treated as a deposition. Peterson was simply a Swede who had learned his lesson and repeated it over and over again. It is distasteful to attack the testimony of these two men, but the truth requires it.

First, take Jordan. He has testified in every different way conceivable in this case. He has said that he came around the bend of Puget Island "very close" to the island shore (*Apostles*, p. 593), "right in close" (p. 621), "about 400 feet" off (p. 646); he has said that he was much further off—indefinite—"a little closer to the Island than to the Oregon side" (*Apostles*, p. 727). He has said that at the first whistle he was closer to Puget Island shore (*Apostles*, pp. 761, 633); he has said that at the first whistle he was "about the center of the river" (*Apostles*, p. 742). He has said that the collision occurred "almost on the ranges" (*Apostles*, p. 739), and told Captain Church that he "had just swung onto the ranges" at the time of collision (*Apostles*, pp. 1106-1107); he has said that it occurred above the ranges (*Apostles*, pp. 596, 601, 738, 684-685). He has said



it occurred in the middle of the river (Apostles, pp. 741, 743, 745); he has said it occurred close to Puget Island—about 800 feet off (Apostles, pp. 599, 655). He has said that he ran on a hard aport helm for 5 or 6 minutes before the collision (Apostles, pp. 761, 762); he has said that he carried a hard aport helm for only a few seconds before the collision (Apostles, p. 708). He has said that his helm was hard aport from shortly after the first whistle to the time of the collision (Apostles, p. 761), while he was running a distance of nearly half a mile (Apostles, pp. 597, 697); he has said it was not hard aport until the second whistle, when the boats were only 400 feet apart (Apostles, pp. 595, 598, 654, 658-660, 704, 708-709). He has said that when he first saw the oil barge and Henderson they were on the ranges (Apostles, p. 647); he has said that when he first saw them they were above the ranges, nearer Puget Island (Apostles, pp. 656, 633, 711). He has said that the green light on the oil barge shut out several times and for a sufficient length of time to indicate she was steering badly (Apostles, pp. 746, 747, 748); he has said that it shut out only once or, possibly, twice, and then only for an instant, as if a stay had momentarily passed in front of it (Apostles, pp. 634, 655, 662-663, 748-749), and that that was not the reason he thought she was steering badly (Apostles, pp. 752-753). He has said that the reason the wreck of the Henderson lodged on Tenas Illihee Island was be-

cause the Samson pushed her there—that “between towing and drifting and shoving her in there” she went two-thirds across the river with the aid of the Samson (Apostles, p. 606); confronted with his testimony before the Inspectors (Apostles, pp. 692-693) he admitted that the Samson had nothing to do with it (Apostles, pp. 718-719). He has said the current kept setting him away from Puget Island—i. e., toward the Oregon shore (Apostles, pp. 658-659, 764-765); he has said that this drift toward the Oregon shore was “very little” (Apostles, p. 776). He has said that the yellow paint from the beading on the oil barge was scraped off against the hull of the port rock barge (Apostles, pp. 769-770); he has said that it was not (Apostles, p. 770).

All of these inconsistencies, except perhaps the last, are upon points vital in this case. Making all due allowance for the natural errors in guessing at feet, distances and minutes, or for errors in charting courses by men not accustomed to it, Jordan’s testimony is so outrageous—the inconsistencies are so glaring, the untruths so apparent—that his whole story must be disregarded as unworthy of belief and the truth about this collision sought elsewhere. Indeed most of his inconsistencies do not involve guessing at feet or minutes or drawing charts, and cannot be explained by saying that they are things about which even an honest man might guess wide of the mark.

But even if you take Jordan's own story it shows that he was at fault. From the mass of contradictions that make it up, this seems to be his story: That he rounded the bend of Puget Island at a speed of seven miles an hour, with a tow that was hard to control; and he did this, although he knew he might likely meet vessels coming up, as is evidenced by the fact that he blew one long whistle before he made the bend (Apostles, p. 592); that when he rounded this bend and saw the oil barge and Henderson, he was about 400 feet off shore; that at that time he saw that the oil barge and Henderson were steering badly; that on receiving the first whistle he ported his helm and ran 5 or 6 minutes on a port helm (not hard aport), and all the time, instead of getting nearer Puget Island, was getting further out in the middle of the river; and yet not until the second whistle, thirty seconds before the boats came together, did he put his helm hard aport in an extreme effort to avoid the collision which took place immediately thereafter more than 800 feet off shore (pp. 726-727).

We contend that he was negligent even in approaching the bend at the speed he did, in the strong current of a June freshet, with a tow which he knew he could not control, and in a black night at that; and that after he got in the bend and was coming downstream in that current, with his unwieldy tow, at a speed of seven miles an hour, and saw, as he claims, that the oil barge

and Henderson were steering badly and he would have to give them plenty of room, and then saw that he was *not* giving them plenty of room, but was getting further out in the middle of the river instead of nearer in toward Puget Island shore, he should have immediately put his helm hard aport, and that he was negligent in his failure to do so and in waiting until thirty seconds before the collision before he put his helm hard aport in an extreme effort to escape. We claim that his negligence was gross in view of the belief he held that the oil barge was steering badly, and would have to be given all the room possible. Or if you accept his statement that he did all possible to avoid a collision, but that his tow was so unwieldy that the Samson, in running a distance of more than half a mile, could not bring it nearer the island shore, but, on the contrary, was continually set further away from the shore by the current, then you have to say that his tow was unmanageable and a menace to shipping, and it was negligence to attempt to navigate with such a craft.

He admits he couldn't control it (Apostles, pp. 658-659):

"Q. Still not seeing you were getting closer to the island, but, on the contrary, getting farther away, why didn't you give hard aport helm?



"A. I gave her hard aport helm just before the second whistle was given; she was swinging; heading toward the island all the way. I couldn't do more than keep her that way, but *she was going down broadside.*

"Q. Didn't you think it was your duty when nervous about his bad steering and trying to give plenty of room, when you were not getting closer to the island but further away, don't you think it was your duty to put your helm hard aport?

"A. She was going over all the time. Giving more port helm all the time.

"Q. Wasn't she going away from the island?

"A. I couldn't help that; *the boat wouldn't shove the scow in. That is all there was to it.*

"Q. Could have by giving hard aport helm, couldn't you?

"A. I don't think so; would have laid right across the current with hard aport helm.

"Q. Do you mean you couldn't control the tow there?

"A. *Not to get in the island that short a space, no, sir.*

"Q. How short a space is that?

"A. *About half way down; probably be half a mile, if a mile from this point to that (indicating). We was about half way down when the collision took place."*

Compare also page 687, where he speaks of the barges being hard to tow.

The only other witness for the Samson who attempts to tell what led up to the collision is John Peterson. He was Jordan's helmsman. Again we say we do not like the task of attacking the veracity of these men, but Peterson's testimony sounds like a lesson he has learned. Again and again and again he reiterates that the Samson's helm was hard aport from the time of the first whistle to the collision:

"A. He says 'Port' after the *first whistle*.

"Q. And how long after that before he gave you the order to hard aport?

"A. Well, I put it over *hard aport*.

"Q. When he told you to port you put it hard aport?

"A. Well, the bell didn't come right on then, because I didn't have my hand on it exactly. He says, 'Have you got her aport?' So just the time he spoke the bell went off.

"Inspector Edwards: The bell went off?

"A. Yes; the bell went off to indicate.

"Inspector Edwards: The indicator strikes the bell?

"A. The indicator strikes the bell.

"Inspector Edwards: Either port or star-board.

"Q. Was that before the second whistle was blown?

"A. That was before the second whistle.

"Q. When the bell went off it was hard over?

"A. When the bell went off it was hard over, yes.

"Q. After that time did it remain hard aport?

"A. *Hard aport up to the time of the accident.*" (Apostles, pp. 1207-1208.)

"Q. And when the *first whistle* did blow the captain said 'port the helm'?

"A. He says, 'Is it to port'? I says, 'Yes; port *hard over*,' I says.

"Q. Hard over at that time? You put it hard over?

"A. It was *hard over up to the time of the accident.*

"Q. *From the time the first whistle was blown?*

"A. *Yes, after he heard the first whistle he says 'port,' and I put it over, hard over.*

"Q. You put it hard over?

"A. *Hard over.*

"Q. And you remember—

"A. (Interrupting.) I remember he said, 'Have you got it over?' I says 'Yes,' and just the time he spoke the bell went off.

"Q. And that was after the first whistle?

"A. After the first whistle." (Apostles, p. 1211.)

"Q. Now, Mr. Peterson, did you do everything which you possibly could do, so far as steering your boat was concerned, after the first whistle was blown to get out your boat to port of the oil barge and Henderson? Was there anything you could do to have gotten your boat farther apart?"

"A. I could not do anything more.

"Q. You could not?"

"A. *No. great God! the wheel was hard over; I couldn't break it.*" (Apostles, pp. 1211-1212.)

"Q. I understand now, Mr. Peterson, that from the time you got a signal from the oil barge your helm was hard apart?"

"A. Yes, sir." (Apostles, p. 1217.)

"Q. Your pilot answered the whistle (i. e., the first whistle)?"

"A. Answered the whistle, yes, sir.

"Q. And you gave her to port?"

"A. Port.

"Q. How much?"

"A. *Hard over.*

"Q. Hard over?"

"A. Well, the bell didn't went off.

"Q. No, not at that time?"

"A. No.

"Q. But it was pretty well over?"

"A. Pretty well over." (Apostles, pp. 1220-1221.)



"Q. You had had her over all the time?

"A. I had had her over right along.

"Q. *Five minutes, you think?*

"A. *I should judge; I could not say exactly. I know she was hard over.*

"Q. You know she was hard over from the time you got the first whistle until the collision?

"A. *Yes, I know that for a fact.*" (Apostles, p. 1223.)

This is different from Jordan's story at the trial of this case, when he said the wheel was not hard over till the second whistle, a few seconds before the collision.

But it is exactly in accord with Jordan's testimony before the United States Inspectors. Remember that this testimony of Peterson's was not given at the trial of this case. It was given at the trial of Captain Jordan before the Inspectors. Jordan swore like Peterson then. They stayed together through thick and thin. Afterwards when it seemed tolerably clear that if they had run on a hard aport helm for the time they said they did, starting from the point close in to Puget Island shore where they said they did, they would have hit the bank—after Captain Church, Jordan's own captain, had given that as his opinion—then Jordan changed his story. But Peterson wasn't available the second time.

Peterson's testimony certainly has the appearance of a story which Jordan had coached him in

and both had agreed to tell. In fact Peterson says (Apostles, p. 1213): "Of course we went into the question after they run into us—" and was unfortunately interrupted. He was referring to the length of time Jordan backed before the collision.

These, then, are the only two men who say they saw the course of the boats before the collision and contradict the eight eye witnesses for the oil barge and Henderson. And of these two it is noteworthy that Jordan has placed the collision on the ranges and off them, in the middle of the river, and close to Puget Island, and that Peterson plainly does not know where it occurred at all. His testimony on this point is vague and is as follows (Apostles, pp. 1216-1217):

"Q. Did you look out about the time of the accident to see whether you were near the shore or not?

"A. *Well, I didn't take much notice of that.* I know we was pretty close where we turned around on the bend.

"Q. You were pretty close to the shore?

"A. Pretty close.

"Q. Did you go nearer the shore or further from shore from that time until the collision?

"A. Well, I should think we keep pretty close.

"Q. Think you kept about the same distance?

"A. The same distance probably.

"Q. Can you tell whether you were nearer to the Puget Island shore or to the Oregon shore?

"A. We was closer to the Puget Island shore.

"Q. You could not tell how near you were to the Puget Island shore?

"A. No, sir, not exactly.

"Q. About what is your estimate? About how far do you think you were from that shore?

"A. Well, I don't know. It might be nine hundred feet, or probably less. I could not tell.

"Q. You could not tell?

"A. I could not tell you, no.

"Q. You could see the shore, could you?

"A. *Well, I didn't take much notice of the shore that night; I will tell you that.*

"Q. But you are sure that you hadn't come down on the range at all?

"A. I am sure I wasn't on the ranges at all.

"Q. And didn't go on the ranges before the accident?

"A. No, sir."

His testimony that he did not go on the ranges before the accident is to be distrusted. He was a helmsman, not a pilot. His only duty was to move the wheel as Jordan told him. It was no part of his duty to notice lights. The Hunting Island Range lights meant nothing to him. There was no reason why he should notice them, and

he probably did not. It is especially untrustworthy in view of Jordan's statements to Church immediately after the collision that he "had just swung onto the ranges." (Apostles, p. 1106.)

### ADMISSIONS OF SAMSON'S WITNESSES WHICH CORROBORATE OUR CONTENTION.

Jordan has admitted that when he first saw the oil barge and Henderson they were on the ranges (Apostles, p. 647, cf. also p. 757). It is true he denied this later and said they were above, but his first statement is undoubtedly the true one, for it is corroborated, not only by the witnesses for the libellant but by Captain Grunstad of the Daniel Kern—a witness for the Samson. Captain Grunstad says that when he passed the oil barge and Henderson they were on the ranges (Apostles, p. 883), and this is the very time Jordan first saw them, for Jordan says that as he came around the bend at Bugby he saw the Kern and oil barge pass each other (Apostles, pp. 594-595). We may therefore take their position on the ranges at this time as certain.

Now Jordan has admitted that the green light of the oil barge kept shutting out—not for one mere instant, as he afterwards testified when he was trying to avoid the effect of his admissions, but for considerable periods of time; so often and so long that he thought the oil barge was



steering badly. The obvious effect of these admissions is that the oil barge and Henderson left the range and hauled over to their starboard side just as Sullivan says they did. After Sullivan had hauled well off and straightened up again, then is probably when Jordan saw both lights again—if he did see them, as he says.

Before this trial Jordan was so insistent on this shutting out of the green light and his consequent inference that the oil barge was steering badly that the Samson's proctors evidently intended to use it as a defense. Their answer says: "The 'M. F. Henderson' and her tow were steering bad and would first open up her green light and then close it out again." (Apostles, p. 11.)

Jordan said before the Inspectors: "I knew she was steering bad. I could see first the red light, then both of them." (Apostles, p. 746.) And again, before the Inspectors (Apostles, p. 747):

"Q. What lights did you see from the Henderson?

"A. Well, she was lit up very bright; her gangway doors forward were open and I could see the reflection very plain from them, the lights themselves; also a red light; *and I hadn't determined yet whether her green light was in sight or not*, because these bright lights were so very bright that it would kind of dim this green light. And then I said to the man at the wheel, 'There's some fellow coming there; we

will have to watch him'; and just about that time she opened up her green light, and then she shut it out again.

"Mr. Snow: Shut it out?

"A. This green light, yes, sir. I says, 'That fellow is steering bad. We will have to watch him, John.' That is the man at the wheel I was speaking to. 'We will have to give him plenty of room.' So *I watched him a little bit. Pretty soon the green light opened up again a very few minutes; well, it wasn't a minute, less than a minute, a good deal; and shortly after that he blowed me one whistle. I answered.*"

Notice in this testimony that at first he couldn't see the green light at all—"I hadn't yet determined whether it was in sight," and that after the green light showed, it went out again and stayed out for some little period while Jordan "watched." He says, "And just about that time she opened up her green light, and then she shut it out again. \* \* \* *So I watched him a little bit* (i. e., while the green light was shut out). Pretty soon the green light opened up again a very few minutes; well, it wasn't a minute, less than a minute, a good deal,"—i. e., apparently when the green light appeared this last time it was only in sight a brief time,—"*less than a minute a good deal.*"

All of which shows that the green light was out for several quite appreciable lengths of time,

and that the oil barge and Henderson were hauling off the range, as Sullivan has said.

It is true Jordan attempted to avoid this by his ridiculous assertion that the flashing out of the green light was instantaneous—as if a stay had swung across it momentarily.

But again his testimony before the Inspectors rises to refute him, and shows that in addition to some momentary shutting out there were the longer periods of shutting out to which we have directed attention.

He said before the Inspectors (Apostles, p. 748):

“Q. You say that she showed the green light at times and then would shut it out at times?

“A. There was only twice it was shut out, and then just for an instant. All the rest of the time it was in sight all the time.

“Q. Well, then she wasn’t steering very bad if she only shut it out for an instant, was she?

“A. Well, this was after the whistle that I had reference to, those whistles.

“Q. Did you notice it before?

“A. I had seen it, yes, sir. That is when I told the man at the wheel he was steering bad, to watch her.”

Counsel have attempted to make something of the fact that the Henderson and oil barge were lashed together at a slight angle, and the side lights, therefore, would show forward, not ex-

actly dead ahead, as required by the regulations, but a little across the course of the vessels. We do not attach much importance to this. We think the angle is so slight that its effect is negligible, but we point out that if it had any effect at all, it would be that the oil barge would have to turn farther to the starboard to shut out the green light than would ordinarily be the case, and that consequently the fact that she did shut it out shows she was hauling over to starboard in a marked degree. See diagram 4 of appellant's brief, where the angle at which the green light would shine across the course of the oil barge is figured at 4.82 degrees.

#### JORDAN'S ADMISSIONS AS TO THE PLACE OF COLLISION.

When Captain Church came on deck immediately after the collision the first thing Jordan said to him in explanation of the collision was, "I had just swung onto the ranges" (Apostles, pp. 1106-1107), which shows that he was much further out in the middle of the river than he was willing to admit at the trial.

At the investigation by the United States Inspectors he said that the river was half a mile wide and the collision occurred a quarter of a mile from the Oregon shore—i. e., in the middle of the river (Apostles, pp. 741-745)—which is, again, much nearer our point of collision than he was willing to admit at the trial.



He has said that he was 400 feet off Puget Island when he made the bend, and 800 feet at the time of collision. In other words, he has described a course which gradually leaves the island shore. Obviously, if the starting point of this course was not 400 feet from the island shore, but much further off—say in the middle of the river—it would throw the whole course that much further from the island, and the end of the course would be very close to the point where we contend the collision took place. It is important, therefore, to see whether this course did not as a matter of fact begin further from Puget Island shore than 400 feet. Jordan himself in one part of his testimony has said it did. (Apostles, p. 727.) If we understand him correctly at this part of his testimony he says that he came around the bend almost in the middle of the river—"A little closer to the island than to the Oregon side." (Apostles, p. 727, cf.; also 782-783.) It is not unlikely that he came around this bend about the middle of the river, since he was apparently expecting, if he met a vessel, to pass on the Oregon side of her to take the "long bend." He says it is customary for boats coming upstream to take the Puget Island side (Apostles, p. 637), and for boats coming down to take "the long bend" (Apostles, p. 729). Captain Church, before the Inspectors, said the Samson's usual course at the bend was in the center of the river (Apostles, p. 1108). He qualified this at the trial

by saying the course was in the center "sometimes" (Apostles, p. 1109). Finally Jordan has expressly said: "I was about the center of the river when I got his first whistle. Inspector Edwards: About the center of the river? A. Yes, sir, the middle of the channel I should judge. Inspector Edwards: When you got his first whistle? A. Yes, sir." (Apostles, p. 742.)

It is therefore possible that Jordan rounded the bend at Bugby Hole further out in the middle of the river than he should have, and because of that, and his excessive speed, and the unwieldiness of his tow, and his failure to make early efforts to haul off to starboard by putting his helm hard aport, was carried by the sweep of the current and his own momentum toward the collision at Hunt's Mill Point. As he says, "*the boat wouldn't shove the scow in. That is all there was to it.*" (Apostles, p. 659.)

### THE DAMAGES.

This was a libel for a total loss. Therefore the measure of damages is the value of the Henderson when she was lost. Her market value on that day is difficult of ascertainment for the reason that there is not sufficient barter and sale and exchange of boats of her class on the Willamette and Columbia Rivers to establish a market price. There is no "market" because the dealings in boats are not extensive enough.

The rule is settled in admiralty that where there is a market, the market value is the best evidence of the true value; but that where there is no market the court will call to its aid every kind of evidence which will help it to ascertain what the true value is. In fact the court will do this anyway, for a court of admiralty is not closely restricted in the evidence it may hear, but may listen to anything that will help it to find the truth.

In Williams & Bruce's Admiralty Practice (2nd Ed.), on page 97, occurs the following language which was quoted with approval in the "H. F. Dimock," 77 Fed. 226, on page 235:

"In ordinary cases the market value of the ship immediately before her loss may be regarded as a fair measure of her value. But, in the case of a ship adapted only for special circumstances, and of such an exceptional character as to be in fact unmarketable, some other criterion must be adopted. In these cases the court will endeavor to arrive at the real extent of the loss sustained by calling to its aid every circumstance which may assist it to form a correct estimate, and the original price of the ship, its condition at the time of the loss, and the sum for which the plaintiff could have got such another ship built, may be very important matters in the calculation."

See also Leonard vs. Whitwell, 19 Fed. 547, 548.

The Lucille, 169 Fed. 719, 721.

Adopting this rule, we gave to Judge Cushman every piece of evidence which could guide him to an accurate estimate of the damages.

1. We showed by the opinion of experts what the boat was worth when she was lost—this was “market value” evidence as nearly as it could be obtained.

2. We showed by the man who built the Henderson what it would have cost to duplicate her at the time of the collision, and what the depreciation would be in ten years’ time (the age of the Henderson when lost).

3. We showed what it cost the Shaver Transportation Company in actual cash to build a new Henderson, using the salvage from the old, the new boat being a duplicate of the old.

4. We showed the value of the salvage, and the cost of making it.

5. We showed the cost of the Henderson when she was built in 1901, and added to in the subsequent years, and showed that the cost of boat building has increased twenty-five per cent since then.

6. We showed the earnings of the old Henderson.

The Henderson was a large river tow boat—158 feet long and 31 foot beam, and was also equipped for passenger traffic. She was what is



called a "combination boat." She was the best boat in the fleet of six or more steamers owned by the libellant, and was principally relied on to do libellant's heavy work. That she was powerful is indicated by the fact that at the time of her collision she was pushing an oil tank steamer 280 feet long, carrying 25,000 barrels of oil, against the current of the June freshet in the Columbia River. She was well built by probably the best builder on the Willamette and Columbia Rivers, and she had been very well taken care of. She had always been salted well and well maintained, and her depreciation was not great in the ten years of her life.

Captain J. W. Shaver, one of her owners, testified that at the time of her wreck she was worth \$45,000—that he would not have taken \$50,000 for her. (Apostles, pp. 1554-1555.)

Captain O. W. Hosford, a steamboat owner himself, and a man of long experience in the towing business on these rivers, who knew the Henderson well, testified that her value in 1911, when she was wrecked, was \$45,000 (Apostles, p. 1575); that it would have cost in 1911 \$55,000 to build a new boat like her. (Apostles, p. 1585.)

We direct the court's particular attention to the testimony of the witness J. H. Johnston (Apostles, pp. 1455-1541). This man was the builder of the Henderson, was aboard her fre-

quently up to her collision, and knew her well. He was most careful and conscientious in his testimony and we place great reliance on it, not only because of the man's high character as an expert boat builder but because of his scrupulous honesty, which is apparent even in print. His method of arriving at the value of the Henderson was to figure what it would cost in 1911 to build a new boat like her, and then to deduct certain sums for the depreciation that the Henderson would have suffered in ten years—her age when wrecked. He did not make any offhand statement. His figures are the result of several days' careful calculation of cost and depreciation. (Apostles, p. 1487.) His estimate of cost of a new boat was \$51,597.60; of depreciation for ten years \$7,709.39; leaving \$43,888.21 as the value of the Henderson in 1911. These figures with the various sums that go to make them up, all carefully itemized, will be found on Apostles, pp. 1464-1466.

This testimony was attacked because Johnston, in making up his statement of cost of a new boat similar to the Henderson, had got from Captain Shaver information as to what articles made up certain of the equipment of the Henderson. In other words, he couldn't duplicate the old Henderson without knowing what was on her. Some of these things he knew himself, some he had to ask Shaver about. Claimant contended this made his report hearsay. Not so. Johnston

in no instance took Shaver's estimate of value of an item without passing his own judgment on it. Some he accepted at the value given by Shaver, some he cut down and some he may even have increased. (Apostles, 1543-1544.) The only thing he took from Shaver was what *articles* were on the boat, not their *value*. (Apostles, p. 1544.) And Shaver testified that all the articles which he gave Johnston for the purposes of his statement were actually on the boat when she was lost. (Apostles, p. 1637.)

This testimony of Shaver's cures any possible defect in Johnston's report standing alone. Moreover, when all is said and done, the main items of cost—the big things, hull, house, boiler and engines—remain unaffected by this criticism, for Johnston knew all about them himself.

No admiralty court seeking after truth under the rules announced in the cases we have cited, could disregard this estimate of Johnston's.

### SALVAGE.

There was some salvage from the Henderson, and this of course should be taken into account in determining the Shavers' loss. The salvage consisted principally in the boiler and machinery. its value was \$16,835. (Apostles, p. 1766.) There is no dispute about this. It cost the Shavers to make this salvage \$9,193.33 (Libel Ex., 31 and 32). This sum is arrived at as follows:

Cost of raising and towing to Portland. \$8424.99

Cost of straightening out wreckage  
after boat was hauled out on the  
ways ..... 878.66

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\$9303.65

Less a credit for return of timbers to  
Eastern & Western Lumber Com-  
pany ..... 110.32

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\$9193.33

The net value of the salvage is therefore its value, \$16,835, less the cost of recovering it, \$9,193.33, or \$7,641.67. This net value, \$7,641.67, is the amount the Shavers actually got out of the wreck of the Henderson, and should therefore be deducted from the value of the Henderson to determine the Shavers' actual loss.

If you take Shavers' and Hosford's estimate of value—\$45,000—and deduct \$7,641.67 the result is \$37,358.33. If you take Johnston's estimate—\$43,888.21—and make the same deduction the result is slightly less—\$36,246.54. This is the minimum that should be awarded the Shavers.

The cost of the salvage operations has been attacked by claimant. Dan Kern, president of claimant, says that \$5,000 would have been enough to pay for "raising the Henderson." (Apostles, p. 1913.) It is not clear whether he includes bringing her to Portland or not. But in



any event he does not include hauling her out on the ways and untangling the machinery and twisted iron, and straightening it out, which latter alone, exclusive of hauling out on the ways, cost the Shavers \$878.66, and is a part of their cost of salvage.

The salvage operations were difficult. Captain Shaver, who conducted them, gives this description (Apostles, pp. 1624-25):

“We found the boat near the head of Tenas Illihee Island, and in 27 feet of water, at low tide, and it being in the summer, there was quite a June freshet, and we only got slack water for about one hour before the top of the flood, which made it very bad in raising the boat, which was laying crossways of the current, and over a little more than on her beam ends. We got the derrick below her, got a hold on the top of the king post with the derrick, and run lines from the top of the hull that was out, and put the steamers—I don’t know what boats it was now. I would have to look that up to see.

“Q. Whose boats were they?

“A. They were the Shaver Transportation Company’s boats. I think the Shaver and the Cascades, but I could look that up and see exactly what boats we had. And we tried to straighten her up, and got her pretty well straightened up, but we were unable to hold

her, and we worked for some three or four days before we was able to get the boat straightened up so we could keep her right side up, and it was impossible to get chains under her before we could get her straightened up. The current runs so strongly most of the time that it was hard to make much headway. Finally, in a few days we got her straightened up and towed her inshore, and got a diver to help get the chains under, and got a barge on each side and kept lifting and at high tide we would take her in on the beach as far as we could, and then tighten up on the chains as the tide went down, until we got her up in shape so we could tow her to Portland.

“Q. How did you get the water out of her?

“A. We never got the water out of her until she was hauled out on the ways of the Portland Shipyard, but I will say that we had, at different times, four and five boats when the tide would be right, to try and straighten her up, and the day that we did get her straightened up we telephoned to Portland to Captain Dell Shaver to be sure and have the Shaver there at a certain time, and we already had the Cascades, No Wonder, Wauna and Sarah Dixon there, and also the Echo. And we had pulled on her about three hours before the Shaver arrived, but was unable to straighten her up, and by the assistance of the steamer Shaver we got

her on an even keel, and was able to hold her there.

“Q. How did you get her to float so you could tow her?

“A. We had one barge on each side, and chains under, and timbers across on the barges, and chains under the steamer Henderson, and held her up in that way. And in towing up to Portland we had the derrick scow astern, and had a chain on the shaft to help hold the wheel and stern up.

“Q. And then you brought her in to Portland that way?

“A. Yes, sir, brought her to Portland in that shape.”

And on page 1676 he says again:

“Q. Do you think it was necessary to use fifteen days in getting that boat up—reasonable time?

“A. It surely was, you bet. We never lost any time we could help. Of course, this boat was a very hard boat to raise. We have got them up in six or seven days, but it was a strong current and 27 feet of water at low tide. And we surely worked hard, and Captain Crowe was there quite a few times, and I talked to him different times; and he said he thought we were getting along as well as could be done.”

Captain Crowe was the representative of the underwriters of the Samson, who are the ones

ultimately liable in this case, under the "running down clause" of their policy, if the Samson is held at fault. (Apostles, pp. 1997-1998.) He died before this testimony on the amount of damages was taken.

Mr. Carstens, the veteran boat builder and salvor of the O.-W. R. & N. Co., called by the Standard Oil Co., and a hostile witness to us, said that he thought the cost of the salvage operations was reasonable, under the circumstances. (Apostles, p. 1899.)

One of the items of expense of salving particularly attacked was the charge made by the Shavers for their boats used in raising the Henderson—\$30 a day for the Echo, \$125 a day for the Wauna, \$150 a day for the Cascades and \$8 an hour for the other boats which were taken off their log towing service from time to time and brought to the scene of operations at hours when the tide was slack, to assist in raising the Henderson. Dan Kern, president of claimant, thought these charges should have been \$25 a day for the Echo, \$100 for the Wauna and \$130 for the Cascades. The rates charged by the Shavers for their boats were, however, the minimum rates charged by them when they performed services for outsiders, and the salvage took place in the busiest time of the year, when the demand on their boats was the heaviest and when it was a serious inconvenience to their business to withdraw these boats from it. As Captain Shaver



said himself: "As far as the fleet employed is concerned, we needed them pretty bad somewhere else. We didn't want them there." (Apostles, p. 1653.) If they had not used their own boats they would have had to hire others at the same or greater prices than they themselves charged.

Honeyman, Lloyds Surveyor, who hires boats frequently on the river, testified that the Shavers' charges were reasonable. (Apostles, pp. 1767, 1775-1778.)

Judge Cushman in his opinion said on this subject: "The work of salving was done by other of libellant's boats. It is contended that more boats than were necessary engaged in this work and that too great a charge has been made for them. It is not probable that more men or boats were used during a busy season than appeared necessary, merely for the purpose of seeking recovery at the end of a long law suit. The evidence fails to disclose that any of them were unnecessary. While the amount charged for the boats appears high, as compared with their ordinary employment, yet, when considered that the need was immediate and urgent; that libellant had to interrupt other employments in which the boats were engaged, to secure their services, the charge does not appear excessive." (Apostles, pp. 64 and 65.)

The loss to the Shavers then, ascertained in the method we have pursued, is \$36,246.54, if

you accept Johnston's estimate of value, or \$37,-358.33 if you accept Hosford's and Shaver's estimate of value.

This result may be checked by supposing for a moment that the Henderson had not been a total loss but had been repaired. In other words, if you treat the new Henderson, which was built around the machinery of the old Henderson, not as a complete rebuilt new boat, but as the old Henderson repaired, and take the amount of money the Shavers actually spent in cash to make the new boat and allow a reasonable amount for demurrage during the time of rebuilding (which is the rule where repairs are made, Spencer on Marine Collisions, Sec. 204) you get a very close check on the amount of damages which we have asked for. In building the new Henderson the Shavers spent the following sums, as shown by libellant's exhibit No. 28:

Material and labor .....	\$27,726.68	
Cost of raising the Henderson and towing her to Portland, etc. ....	\$8,424.99	
Less credit for timbers returned .....	110.32	
	<hr/>	8,314.67
Cost of straightening out the wreckage after the wreck was hauled out on the ways .....		876.66
Total .....		<hr/> \$36,917.91

This is the money actually spent by the Shavers in building the new boat. The new boat, however, was short on equipment as compared with the old. The value of the equipment which was on the old boat and was lost and was not put on the new boat was \$1,385.48. This, therefore, should be added to the amount of cash expended. There should also be added a reasonable allowance for demurrage. The demurrage allowed by Captain Crowe, surveyor for the underwriters of the Samson, was one hundred and fifty days at \$30.00 a day, or \$4,500.00. Adding these three sums gives the following result: \$36,917.91, money actually expended; \$1,385.48, value of equipment lost on the old boat and not on the new; \$4,500.00 demurrage; total \$42,803.39. This would be the Shavers' actual damage if the new Henderson be considered not as a new built boat, but as a repair of the old. Nor could there be any deduction from this amount under the rule of "new for old," for that rule is applicable to insurance cases but not to this. Spencer on Marine Collisions, Sec 199, says:

"The owner is entitled to recover as damages whatever sum is found necessary to restore his vessel to the condition it was in before the collision, notwithstanding that in making the repairs new and more valuable materials are used than were in the vessel at the time of receiving the injury; subject, however, to the general provision of law that the owner may

not captiously insist on repairs where such repairs would equal or exceed the value of the vessel at the time of the collision.

"In all cases the measure of indemnity is co-extensive with the injuries received; and the fact that new and better material entering into the repairs may render it better than before the collision, affords no reason for an allowance for such bettered condition. In making repairs in collision cases, a different rule prevails than in insurance cases, where an allowance is usually made for new material; in collision cases no such allowance is permitted."

As another indication of the Shavers' loss we showed the net earnings of the Henderson for the two and a half years prior to her collision. These were \$38.79 a day in 1909, \$38.30 a day in 1910 and \$21.42 a day for the year 1911 up to the time the boat was wrecked, or an average of \$35.36 a day. (Apostles, pp. 1157-1559.) The earnings were less in 1911 because the lumber mills were not running full capacity in January and February of that year. (Apostles, p. 1741.)

The estimate which Johnston and Shaver made of \$50,000 as, in round numbers, the cost of building a complete new Henderson in 1911, is corroborated by looking at the cost of the old Henderson in 1901 and the subsequent years, when additions were made to her, and adding to this the proper percentage on account of the in-



creased cost of building boats in 1911. This increased cost is due to the increase both in labor and materials and is testified by the experts, even the hostile ones, to be about twenty-five per cent. (Johnston, Apostles, p. 1466; Supple, p. 1789.) The cost of the old Henderson in 1901 was \$39,393.42 (Apostles, pp. 1986 and 1987), or in round numbers \$40,000.00. Increase this twenty-five per cent and the result is \$50,000.00. Johnston's estimate of the cost of the new boat was \$51,597.60 (Apostles, p. 1465), so the two are fairly close together.

It was contended by claimant at the trial that the Henderson's hull could have been repaired and should not have been discarded as a total loss. We ask your Honors to look at the photographs of her, which libellant has introduced. She was "hogged" so that her stern was dropped down four feet, and she had a bad twist in her so that it would have been impossible ever to put her in as good shape as she was before. If she had been straightened she would have been hanging entirely on her hog chains instead of being stiffened partly by her kelsons. (Shaver, Apostles, pp. 1616-1617.)

Johnston says that if she had been his he would have floated her off and burnt her. (Apostles, p. 1542.)

Shaver says she wasn't worth repairing and describes her condition. (Apostles, pp. 1616-1617, 1672.) He offered to Kern to repair the

hulk and sell it to him for \$2,000, and the repairs cost \$1,800. This was practically offering the boat for the cost of repairs and Kern wouldn't take it. (Apostles, p. 1634.)

Nelson says that the value of the old hulk was nothing, that it could not be repaired without a complete rebuilding. (Apostles, pp. 1755-1756, 1762.)

Honeyman says the same. (Apostles, p. 1780.)

Carstens, a hostile witness to us, says that the hulk was worth nothing; "as far as that goes I wouldn't give a dollar for it." (Apostles, p. 1888.) He would have rebuilt new. (Apostles, p. 1902.)

Captain Crowe, in his report to the underwriters of the Samson, recommended building anew. (Apostles, p. 2001.)

## CONCLUSION

We want to say a word in conclusion. Claimant and the respondent, Standard Oil Company, at the trial introduced evidence that the Henderson was not worth over \$25,000.00; that she could have been repaired for \$16,000.00, and the suggestion was made at the trial by one of the proctors for the Standard Oil Company that in these collision cases the libellant always estimated his loss too high and the defendants always estimated it too low in the expectation that the court would split the difference. We urge your Honors as earnestly as we can not to be guided by such

an idea in making your award of damages. The Shavers have gone about the estimate of their loss as honestly and conscientiously as it could be done. Even if they are awarded the full amount which we ask, in round numbers \$37,000.00, they will not be made whole, for they will be paid nothing for the time that was lost in building their new boat. They lost the use of the best boat in their fleet and were not able to replace it for about a year, and for this loss they got nothing because, this libel having been for a total loss, demurrage is not allowed. The Shavers are honest, hard working river men, who have built up their business by plain, straightforward honesty, and in making up their statement of damages in this case they have not added one single dollar to which they are not entitled. They have even cut out a few items which appeared to them to be doubtful charges against those at fault for this collision. We say to the court again with all the earnestness we can put into it that the Shavers did not make their estimate of damages high with the expectation that the court would cut it down, but have asked only for just what was due them. Even Captain Crowe, Mr. Honeyman and Mr. Carstens, the men who surveyed the wreck, Captain Crowe and Mr. Honeyman for the underwriters and Mr. Carstens for the Standard Oil Company, all hostile witnesses to us, were willing to allow the Shavers \$34,886.54. (Apostles, p. 2003.)

Judge Cushman refused to allow the Shavers the full amount they asked because he thought that Johnston's estimate of depreciation was not large enough, and therefore cut down the award \$5,000. (Apostles, p. 64.) This, in our view, was not justified. Johnston, a man of lifelong experience in both hulls and machinery, did not lump off his depreciation in one sum, but estimated it very carefully, item by item,—forty per cent on the hull, eight per cent on the house, eighty per cent on the painting, two per cent on hog chains, rudder stocks, cavel, cleats, chalks, etc. (in other words, iron work on which there was little wear), fifteen per cent on the boiler, and so on. It is in evidence that the Henderson had been remarkably well kept up, that repairs had been made on her whenever necessary, that at the time of the collision she was good for two or three years more without spending anything on her, and at the end of that time an expenditure of a few thousand dollars would have made her good for another ten years. Carstens, a hostile witness, says \$6,000 would have done this. (Apostles, p. 1899.) Shaver says less. In view of the foregoing, we think that Johnston's estimate of depreciation is as accurate as could be had and that Judge Cushman's reduction of the award because he thought the depreciation was not figured high enough was not warranted, and we earnestly urge your Honors to raise the award to the sum that will come more nearly making the Shavers whole.

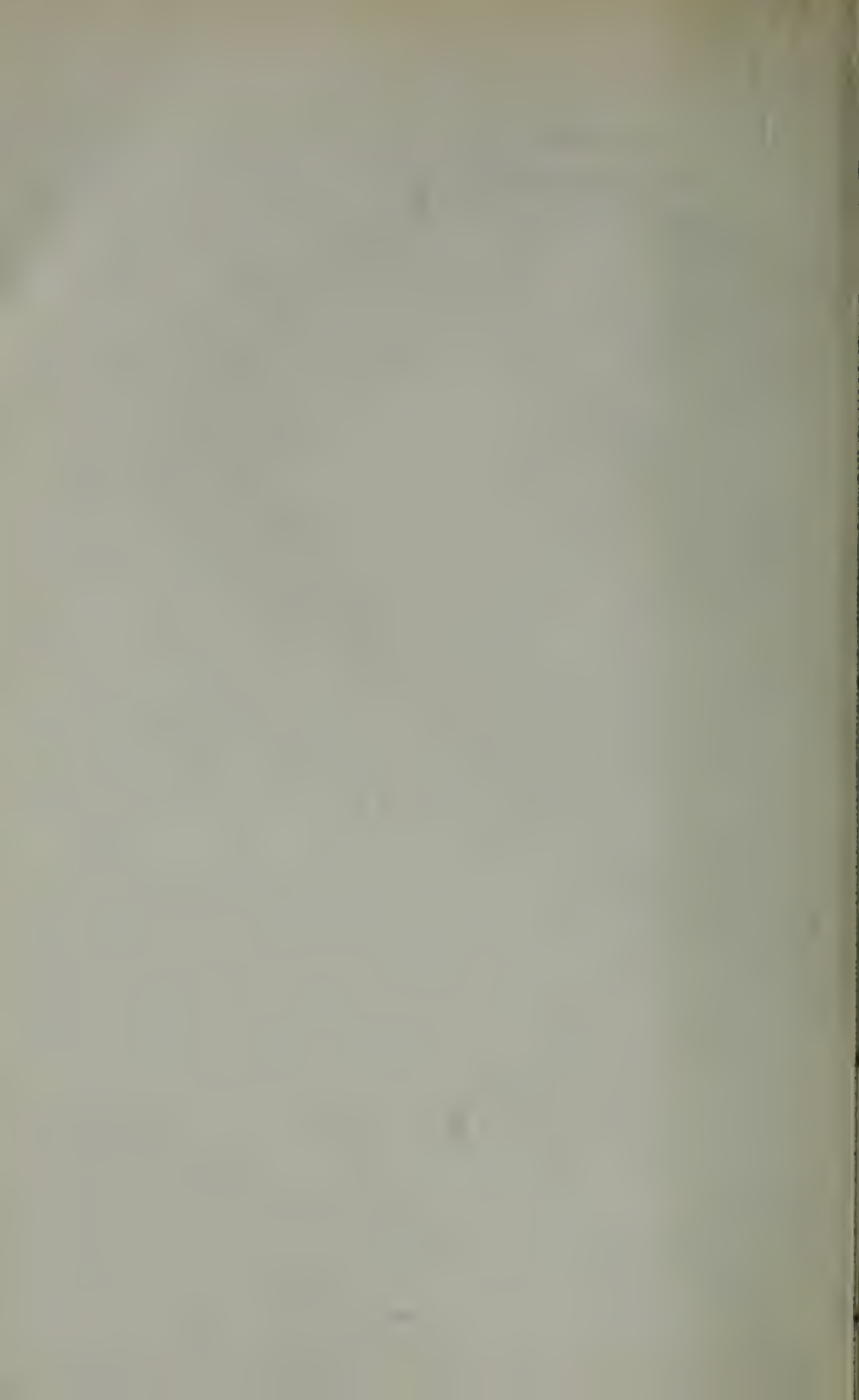


This sum we ask from the claimant. But if your Honors believe that the oil barge was responsible for the collision, then we ask this sum from the respondent, Standard Oil Company, since it is conceded that the Standard Oil Company had our boat under its sole command and control. We are entitled to recover from one or the other, or both.

Some assignments of error were made on account of the award of costs. We do not care to lengthen this brief by the citation of authorities, but refer to Judge Wolverton's opinion, *Apostles*, pp. 85-89, in support of the award.

Respectfully submitted.

C. E. S. WOOD,  
ERSKINE WOOD,  
*Proctors for Libellant.*

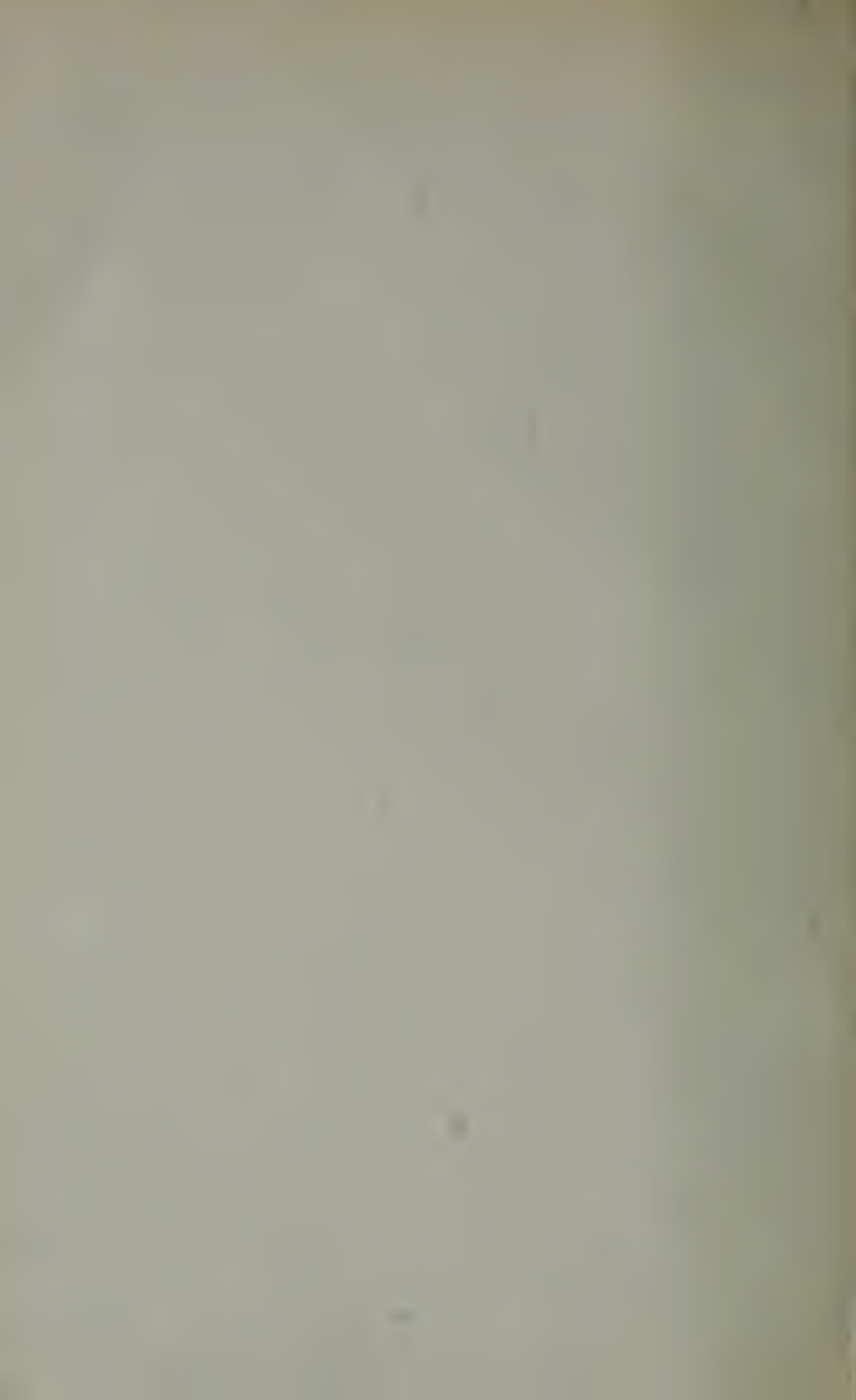












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IN  
**The United States Circuit  
Court of Appeals**  
for the Ninth Circuit

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**STEAMER "SAMSON" and BARGE No. 8,  
BARGE No. 9 and BARGE No. 27**

**COLUMBIA CONTRACT COMPANY,  
a Corporation  
CLAIMANT AND APPELLANT**

**SHAVER TRANSPORTATION COMPANY,  
a Corporation  
LIBELANT AND APPELLEE**

**STANDARD OIL COMPANY OF CALIFORNIA,  
a Corporation  
RESPONDENT IN PERSONAM**

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**Brief on Behalf of the Standard Oil  
Company of California**

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**APPEAL FROM THE DISTRICT OF OREGON**

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**SNOW & McCAMANT and  
GEORGE B. GUTHRIE  
Proctors for Standard Oil Co.**

**WOOD, MONTAGUE & HUNT  
Proctors for Appellee**

**TEAL, MINOR & WINFREE  
Proctors for Appellant**





In the United States Circuit  
Court of Appeals  
for the Ninth Circuit

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STEAMER "SAMSON" and BARGE No. 8,  
BARGE No. 9 and BARGE No. 27.

COLUMBIA CONTRACT COMPANY,  
a Corporation,  
*Claimant and Appellant.*

SHAVER TRANSPORTATION COMPANY,  
a Corporation,  
*Libelant and Appellee.*

STANDARD OIL COMPANY OF CALIFORNIA,  
a Corporation,  
*Respondent in Personam.*

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Brief in Behalf of the Standard Oil  
Company of California

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**STATEMENT**

This appeal of the Columbia Contract Company arises upon a decree below charging the claimant with liability for a collision on the Columbia River between the Steamer "Henderson," owned by the libelant and having in tow

Barge 93 belonging to the Standard Oil Company and bound up the river for Portland, and the Steamer "Samson" and her barges loaded with rock bound down the river for the mouth of the Columbia.

The libelant libeled the Steamer "Samson" and her barges *in rem*, pleading negligence of the Steamer "Samson," her officers, etc., as the cause of the collision, and in due season, after some preliminary exceptions and objections, an amended libel was filed, and the Steamer "Samson" and her barges through their claimant answered the libel.

Whereupon the libelant filed in the then pending libel *in rem*, what is denominated in the record a supplemental (amended) libel *in personam* against the Standard Oil Company of California. This supplemental or amended libel so-called pleaded in effect that the damage occurred through the negligence of the Steamer "Samson" (See Article V, page 20 of the Record) and then pleaded that the Columbia Contract Company had filed its answer to the libel *in rem* and had pleaded facts which if true tended to show that the collision arose through the negligence of the pilot who had been employed by the Standard Oil Company to pilot the "Henderson" and Barge 93, and it was charged in this supplemental (amended) libel as follows:

"Article VII. If the aforesaid allegations of the said answer of the claimant and stipu-

lator Columbia Contract Company shall by the evidence be proven true, then the sinking and loss of the Steamer 'M. F. Henderson' was occasioned by the negligence of the Oil Barge 93, or the joint negligence of said Oil Barge No. 93 and the said Steamer 'Samson,' and in order to prevent a multiplicity of suits, and to bring all parties interested or liable in this suit, libelant brings this its libel against said respondent the Standard Oil Company, incorporated under the laws of the State of California, and alleges that said Standard Oil Company is a joint tortfeasor with and jointly concurred with the Steamer 'Samson' in such negligence as caused the total wreck of the said Steamer 'M. F. Henderson' as aforesaid."

It was not charged that the facts pleaded by the Columbia Contract Company were true (For the Supplemental Libel see pp. 19-29), and these facts so pleaded were in fact inconsistent with and contradicted by the facts of the collision as pleaded by the libelant.

The Standard Oil Company having been served appeared and moved to take the supplemental libel from the files and vacate the order giving leave to file the same upon the grounds:

# I.

"The libelant has not stated such grounds in its supplemental libel or in application to file the same as entitles the libelant to file the supplemental libel herein; nor are the facts stated in the supplemental libel such as that the same constitute matters of supplemental libel herein; nor are the facts stated in the supplemental libel such as that any relief can be granted against this respondent."

## II.

"Libelant by its original libel herein filed against the Steamer 'Samson,' Barge No. 8, Barge No. 9 and Barge No. 27, hath made and presented a case *in rem* against the said 'Samson' and her barges, and by the supplemental libel filed herein the libelant has undertaken to proceed against this respondent *in personam*, and the two proceedings cannot be properly joined."

The court below, Bean, District Judge, overruled the motion and filed an opinion thereon, and thereupon the Standard Oil Company through its proctors filed exceptions to the supplemental libel as follows:

## I.

"That the said supplemental libel and the whole thereof is uncertain and insufficient in that it does not charge this respondent with the violation of any duty owed to the libelant by this respondent, but on the contrary expressly asserts negligence in navigation on the part of the Steamer 'Samson' and her barges, as also does it assert due care and proper navigation on the part of the Steamer 'Henderson' and Barge No. 93, and the said libel wholly fails to state facts sufficient to constitute suit against this respondent."

## II.

"The said 'supplemental libel' and the whole thereof is manifestly indirect, inconsistent and insufficient for the reason that this respondent is liable to the libelant if at all under a breach of its contract of charter with the owner of the 'Henderson,' as manifestly



appears from the said libel itself, and this respondent was not and cannot be as to the libelant a joint tortfeasor with the 'Samson' on account of the negligence asserted in either the amended libel of the libelant or the answer of the claimant, and that thereby two separate causes of action are improperly joined herein; as also it is improper under the rules and practice of admiralty by process *in personam* to join this respondent in the same suit with a proceeding *in rem* brought against the Steamer 'Samson' and her barges."

### III.

"That the said 'supplemental libel' and the whole thereof is uncertain, indirect, evasive and insufficient in that as manifestly appears by Article VII thereof libelant's asserted claim against this respondent is wholly hypothetical, based upon the condition that libelant's averments in its amended libel are false and untrue, whereas libelant is bound to know the truth of its articles in this case propounded under oath."

The exceptions being overruled, the Standard Oil Company filed its answer to the supplemental libel, admitting largely the whole thereof.

The claimant Columbia Contract Company, but without any reason therefor, since the supplemental libel was not filed against it, likewise answered the supplemental libel, pleaded the negligence as that of the Steamer "Henderson" and Barge 93, alleged that by reason of the collision certain damages had accrued to it and prayed that the libel be dismissed with costs, and that the claimant might "have and recover

of and from Shaver Transportation Company, libelant herein and owner of the Steamer 'M. F. Henderson,' or from the Standard Oil Company, incorporated under the laws of the State of California, and owner of Oil Barge 93, or against Shaver Transportation Company and the Standard Oil Company" the damages which it alleged had been suffered. This answer was not served upon the proctors for the Standard Oil Company.

The cause being at issue, a trial was had in open court and proof submitted on the question of liability by witnesses called and heard by the trial court, which found against the contentions of the Columbia Contract Company and awarded damages to the libelant; the decree dismissed the supplemental or amended libel of the libelant filed against the Standard Oil Company and directed that one-half of the costs of the Standard Oil Company should be recovered against libelant and the other half of its costs should be recovered against the Columbia Contract Company, and cost bills were filed accordingly.

It seems that the Standard Oil Company had an arrangement or agreement with the Oregon Round Lumber Company for the towage of all its vessels which might come into the river with oil, and the Oregon Round Lumber Company being advised of the necessity under the contract to tow Barge 93 called on the Shaver Transportation Company to do the towing, and while the towing was being done the collision occurred.

## I.

## THE QUESTION OF LIABILITY.

In the brief filed for the appellant it is said:

"The evidence in the case is exceedingly conflicting, so that it may be said that it is impossible to reconcile the evidence. Your Honors must, therefore, consider the stories as told by the several witnesses and from such stories ascertain if possible the responsibility for the collision."

This is a correct statement of the contradictory character of the evidence, and under the well-recognized rule which has been repeatedly announced and applied in this court, where the evidence is conflicting this court will not disturb the conclusion of the court below, especially where, as in this case, the evidence on the question of liability was heard in open court.

If, however, it becomes necessary so to do, the Standard Oil Company of California requests leave to file a brief upon the question of liability and upon the further question of whether or not in this cause the Standard Oil Company can be held on the supplemental or amended libel of the libellant filed in this cause, and whether such supplemental or amended libel states any cause of suit against the Standard Oil Company.

## II.

THE QUESTION OF COSTS AS BETWEEN  
THE STANDARD OIL COMPANY AND THE  
COLUMBIA CONTRACT COMPANY.

The court below having found the Steamer "Samson" and her barges responsible for the negligence, it followed that the supplemental or amended libel of the libelant against the Standard Oil Company should be dismissed, and an order of dismissal was entered accordingly in connection with the final decree, and the costs incurred by the Standard Oil Company in its defense were ordered to be taxed one-half against the Shaver Transportation Company and the other half against the Columbia Contract Company, the claimant.

It is submitted that it would have been quite proper for the court below to have ordered a taxation of all of the costs of the Standard Oil Company incurred in its defense against the libelant, with a recovery over by the libelant against the Columbia Contract Company of the costs of the libelant, and one-half of the costs which might be taxed by the Standard Oil Company against the libelant, and if this is so it would be quite proper for the court below to make a short cut producing the same results. The appellant in its answer to the libel pleaded the negligence of the "Henderson" and the pilot in charge of Barge 93, and in its answer to the



supplemental libel pleaded the same facts and prayed that its damage be awarded against either the libelant or the respondent or against both. Under the circumstances, therefore, the appellant cannot object to the taxation ordered, because the appellant itself is responsible for the false allegations making apparently necessary the filing of the supplemental libel. On this question Judge Cushman, in his opinion filed in connection with the taxation of the costs, said:

“The equitable reasons controlling any award of costs would be partial reimbursement of the party put to costs, and the awarding of them against the party causing those costs to be incurred. It is apparent on the face of the record that, had not the allegations of respondent’s fault been made in the answer, such allegations would not have been realleged by libelant in its supplement libel.

“Ordinarily costs would be merely incidental to the main recovery sought; but, ordinarily, there would be but two parties before the court. No equitable reason is perceived why a party who starts a false accusation, on the basis of which allegation the same is realleged by another party, should not have a part of the costs to which the party is put—against whom the same is made, taxed against it.

“Respondent contends that its decree for costs should be against the libelant, alone, and that libelant recover half, or all of those costs over against claimant. No equitable reason appears why, if this result might be attained indirectly in the manner proposed, it should not be attained directly—both the claimant and respondent being before the court—by a de-

cree awarding such costs against the claimant to the respondent.

"It is suggested that, if such costs might be so awarded, the claimant might be put to the costs of any number of parties in no way responsible, such innocent parties being brought into the case by libelant. The extreme case so pictured is not this case, in which a party has been brought in by reason of the unfounded allegations of claimant's answer."

However, inasmuch as the brief of libelant does not discuss the theory upon which the costs are taxed it is assumed that the assignments of error on this question are abandoned.

SNOW & McCAMANT,  
GEO. B. GUTHRIE,

*Proctors for Sandard Oil Company  
of California.*

IN  
**The United States Circuit  
Court of Appeals**  
for the Ninth Circuit

**THE STEAMER "SAMSON" and BARGE No. 8,  
BARGE No. 9 and BARGE No. 27**

**COLUMBIA CONTRACT COMPANY,  
a Corporation  
CLAIMANT AND APPELLANT**

**SHAVER TRANSPORTATION COMPANY,  
a Corporation  
LIBELANT AND APPELLEE**

**STANDARD OIL COMPANY OF CALIFORNIA,  
a Corporation  
RESPONDENT IN PERSONAM**

**Reply Brief on Behalf of Claimant  
and Appellant**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON**

**TEAL, MINOR & WINFREE  
ROGERS MACVEAGH**

**Proctors for Claimant**

**FILED**

**MAY 28 1914**





**In the United States Circuit  
Court of Appeals**  
for the Ninth Circuit

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THE STEAMER SAMSON, and BARGE No. 8,  
BARGE No. 9 and BARGE No. 27.

COLUMBIA CONTRACT COMPANY,  
a Corporation,  
*Claimant and Appellant.*

SHAVER TRANSPORTATION COMPANY,  
a Corporation,  
*Libellant and Appellee.*

STANDARD OIL COMPANY OF CALIFORNIA,  
a Corporation,  
*Respondent in Personam.*

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**Reply Brief on Behalf of Claimant  
and Appellant**

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*Appeal from the District Court of the United  
States for the District of Oregon.*

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In this case the testimony on behalf of the libellant, except as to the amount of damages and except the rebuttal testimony on the ques-

tion of negligence, was taken before Judge Cushman. The rebuttal testimony and all the testimony in regard to damages was taken before a referee, so that Judge Cushman never saw the witnesses nor heard the witnesses testify in regard to damages.

The rule of law is clearly stated by this court in *Spencer v. The Dalles, P. & A. Navigation Co.*, 188 Fed. 867, wherein the court says:

“No useful purpose could be subserved by an extended discussion here of the question of fact whether the Charles R. Spencer or the Dalles City was the more to blame for the collision. The most that can be said for the appellant is that the voluminous testimony is highly conflicting, and that it is entirely possible to take the view that the Dalles City was wholly at fault, or that the Charles R. Spencer was alone responsible for the accident, or that the negligence of both vessels contributed thereto. We have the testimony of a number of witnesses in support of any one of the three possible views, and *there is nothing inherently improbable in any of the theories, nor is there any admitted or incontrovertible fact or circumstance which is wholly inconsistent with any one of such theories.* It is clearly a case of conflicting oral testimony, where it cannot be said that there is a strong preponderance with either party. The District Judge heard the witnesses testify, and

observed their demeanor while upon the stand. His finding upon the conflicting evidence was that the Charles R. Spencer alone was responsible for the collision, and that the Dalles City was wholly without fault. Under the well-settled rules of appellate procedure, the finding ought not, under the circumstances, to be disturbed.

In *The Alijandro*, 56 Fed. 621, 6 C. C. A. 54, we have said:

“The rule is well settled that in cases on appeal in admiralty, when the questions of fact are dependent upon conflicting evidence, the decision of the District Judge, who had the opportunity of seeing the witnesses and judging their appearance, manner, and credibility, will not be reversed unless it clearly appears that the decision is against the evidence. *The Albany*, (C. C.) 48 Fed. 565, and authorities there cited.’”

The appellee, page 8 and following, claims the location of the oil barge at anchor after the collision clearly establishes which party was at fault. The appellant does not concede that the location of the oil barge is a controlling factor, but it does claim that the location of the oil barge confirms the contention of the appellant.

The testimony shows that the oil barge was anchored betwten 150 and 300 feet from the Oregon shore, tailing down stream into Prairie Channel; the contention of the appellee is that

the oil barge did not drift, after it was cut loose from the "Henderson," a distance of more than its own length. It is conceded that the oil barge was going at the time of the collision at a speed of three miles an hour, that she was cut loose absolutely and immediately from the "Henderson" and that she did drift to some extent; the appellee claims that her anchors were down within thirty seconds after the crash; that she was a "helpless floating mass"; that the bottom was good holding ground; that the anchors were heavy and that the oil barge did not drag them. The appellee further claims that the pilot of the oil barge had ordered the boatswain to stand by the anchors before the collision.

It is true that Sullivan testifies, page 158, that after he blew the second whistle, he told the "quartermaster" to stand by his anchors; he admits, page 159, that he did not so testify before the inspectors and that he was asked to state all orders which he gave. As a matter of fact, the party who let go the anchors was not the quartermaster at all, but the boatswain, Martinson. The quartermaster was Kalberg. His testimony is found on page 2016 and following; he was at the wheel and remained at the wheel, and he was the only person on the oil barge or the "Henderson" who heard the second passing signal answered by the "Samson." Martinson testifies that Sullivan gave him no orders to stand by the anchors, and on page 112 he says that



the only order which he can remember is when the pilot sang out "Let go the anchor." It is admitted that before the inspectors Sullivan testified, page 197, "*it was in the neighborhood of five minutes after the collision before the oil barge came to anchor so that it was safe and he could look around,*" and on page 199 he testified, also before the inspectors, that at the time he had time to look around, the "Henderson" had not sunk and her electric lights were burning and *that after he looked around it was two or three to five minutes before the "Henderson" sank.* The oil barge, therefore, drifting five minutes after the collision and before she came to anchor, would have drifted a distance of 1056 feet; and, if she drifted only two and one-half minutes, she would have drifted 528 feet. It is conceded that when at anchor she had out forty fathoms of chain and was anchored in water about forty feet deep. This conclusively shows that she drifted after the anchors were let go and the distance that she drifted, according to the testimony of the pilot himself, could not have been less than 528 feet and may have been as much as 1056 feet. At all events it is clear that after the oil barge came to anchor she was much farther from the "Henderson" than the "Samson," for her lifeboat sent to rescue the passengers from the "Henderson" did not arrive at the "Henderson" until after the passengers and crew had been rescued. Indeed, it may be said to be

a physical impossibility for the oil barge to have drifted for the time which Sullivan claims without having run aground, if the collision took place where Sullivan claims it occurred and where the appellee contends it occurred. In truth, the order to drop the anchors was not given immediately after the collision, Kayser, who was awakened by the crash, admits that the anchors were not dropped until after he jumped out of bed and ran upon deck. (Apostles, pp. 14 and 15.) Captain Sorley (Apostles, pp. 2039-2040) testifies that he gave the order to let go the anchors and that about the same time he heard a like order given forward. He, also, was asleep at the time of the crash and did not give the order until after he got on deck. Crossen, the watchman on the "Henderson," testifies (Apostles, p. 1325) that *he was on the oil barge probably one-half a minute before he heard the anchors let go, and on page 1235 he testifies that it was quite a while before the lines parted.* The physical fact cannot be disputed that if the collision had occurred at the place where the appellee claims it occurred and the oil barge had drifted as long as even two minutes, the oil barge would have been on the shore before she came to anchor. On the other hand, if the collision occurred where the appellant claims it occurred and the oil barge had drifted for five minutes she would have gotten as near the shore

as she was when found at anchor the next morning and would have drifted in that direction.

The appellee in its brief, page 23 and following, claims that the position of the "Henderson" also indicates that the collision was on the Oregon side; the appellee ignores in this contention the evidence of its own witnesses. They testify that at the time of the collision the "Henderson" was backing and that she continued to back after the collision. The appellee claims that the collision occurred within a few feet of where the oil barge was found at anchor. It is conceded that the "Henderson" came to rest on the sands below the point of Tenas Illihee Island. Upon what principle did the oil barge when it anchored tail down along the Oregon shore and the "Henderson" drift almost at right angles to the Oregon shore? Witnesses for the appellee testify that the "Henderson" was backing for not more than one minute prior to the collision and continued to back until her machinery was stopped by the water; she was backing under a port helm. This would tend, of course, as long as the backing continued, to carry the "Henderson" toward the Washington shore.

It is admitted that the "Samson" took hold of the wreck of the "Henderson"; *it is not denied that she nosed and pushed and pulled her over toward the Tenas Illihee shoals.*

Jordan in his testimony (Apostles, p. 606) states that in his opinion, the "Henderson"

drifted and was towed after the "Samson" got a line on her, two-thirds of the way across the river. Goodell (Apostles, p. 804) testifies that, in his judgment, the "Samson" dragged the "Henderson" 600 or 700 feet. Church (p. 1072) testifies that the "Samson" kept working ahead and shoving the "Henderson" toward the Oregon shore. It is significant that this testimony is not denied by any witness for the appellee; none of the officers or crew of the "Henderson" was called to deny the testimony of these witnesses to the effect that the "Samson" put a line on the "Henderson" and pulled and pushed the "Henderson" toward the shore of Tenas Illihee Island. Every witness who reached the "Henderson" after the collision and before the "Samson" got the line on the "Henderson" testifies that the "Henderson" at that time was above the point of Tenas Illihee Island.

The appellee also contends that the hole in the port side of the "Henderson" also corroborates the appellee. There can be no question under the evidence in this case that this hole was made by the center barge of the "Samson's" tow. The injury to this barge fully establishes this fact; the testimony of the eye witnesses on the "Samson" corroborates this evidence. The testimony on behalf of the appellee to the effect that even if the hole was made by the port barge, as contended, the center barge would have struck the "Henderson" further aft, further corrobor-



ates this evidence. It must be remembered that the appellee admits that just before the collision, under orders from Sullivan, the "Henderson" was stopped and backed with the helm to port. This would have thrown the stern of the "Henderson" still more in the path of the rock barges. The "silent evidence of the collision"; that is to say, the anchorage of the oil barge, the location of the wreck of the "Henderson" and the hole in her port side, fairly and forcibly corroborate the contention of the claimant and are wholly inconsistent with the claim of the appellee.

## ORAL TESTIMONY

Appellee, page 31 and following, states that Sullivan, Kalberg, Martinson and Stayton, officers of the oil barge and "Henderson," and Eddie Grove, Loaland, Dahl and Ole Grove, fishermen, observed the course of the "Henderson" and oil barge prior to the collision and unite in saying that the "Henderson" and oil barge hauled well over to the Oregon shore and gave the "Samson" plenty of room. So far as Sullivan, Kalberg and Martinson are concerned, we admit that they were in a position to know what the course of the oil barge and "Henderson" was, and Stayton upon the "Henderson" was also in position to observe and know the course pursued. It must be remembered, however, that upon examination before the inspectors, Stayton locates the collision

as on the Puget Island side of the range line (Apostles, pp. 517, 518, 519, 520) and changes his testimony after observances made after the collision. The other witnesses, Ole Grove and Dahl, were, as they say, at the tow head, 900 feet from the range line and on the Washington side thereof and three-quarters of a mile from the vessels at the time of the collision. The night was dark,—so dark that Stayton on the “Henderson” could not see Sullivan on the oil barge, 190 feet away. The other two fisherman, Grove and Loaland, were three-quarters of a mile to a mile away. They had no reason to observe the course of the “Henderson” and oil barge. The appellant respectfully submits that these fishermen were *not “eye witnesses”* at all; that they did not actually see the collision, or, if they saw the collision, they were so far away that it was impossible for them to say where the collision took place. Testimony of this character condemns itself. When a man testifies that on a dark night he can locate vessels in a collision when the collision occurred over three-quarters of a mile away from him, common experience teaches us that such testimony cannot be believed. Sullivan (Apostles, p. 107) testifies that he was on a course parallel with the range line and not more than 500 to 600 feet below the line on the Oregon side. Stayton admits, as has been said (Apostles, p. 507), that in his judgment the center barge should have struck the “Hender-

son," and on page 517, before the inspectors, he testifies that the collision occurred right below the seining ground where there is a slough and some piling; that where the vessels hit was abreast of the seining ground near a little slough which runs in there with some piling at the end of it. On the same page he testifies that he judged this was the place of the collision from the location of the oil barge the next morning; on page 519, before the inspectors, he testified that the accident took place in around that little swale, that little slough there, and that there was some piling at the end of it. On the same page he testifies that that testimony was correct when he gave it. The oral testimony of Stayton, therefore, corroborates the contention of the appellant rather than that of the appellee. Martinson, as shown in our former brief, admits that he was not paying any attention to his duties as lookout. Of the so-called "eye witnesses" named by the appellee, therefore, it may be said that the only testimony which sustains the appellee is that of Sullivan and Kalberg, for the testimony of the fishermen should be eliminated as too improbable for belief, and Martinson admits that he was not paying any attention, and Stayton admits that the next morning after the accident he located the collision practically at the point at which Jordan locates it.

On the other hand, on behalf of the appellant, there is the testimony of *Jordan*, whose testimony

is entitled to at least as much credit as that of Sullivan. He does not contradict himself oftener than Sullivan, nor does he contradict himself in matters of such grave importance as those in which Sullivan contradicts himself. Then there is a witness, Peterson, the helmsman. *Peterson* was examined and cross-examined before the inspectors by Inspector Edwards; again by Mr. Shepard, who appeared as attorney for the "Shaver" and for Captain Sullivan; and again by Inspector Evans; and still again by Mr. Shepard. (Apostles, pp. 1198 to 1225.) This witness unquestionably told what he believed was true. His testimony is not wholly in accord with that of Jordan. It is not necessary to say that the charge made against his testimony by the proctor for the appellee is without any foundation. His testimony is not in accord with that of Jordan before the United States inspector in many particulars,—in many particulars it does accord with the testimony of Jordan. This man Peterson was the helmsman on the "Samson." He had no interest in the matter, as he steered by the order of the pilot and not upon his own initiative.

*Parker*, another witness on behalf of the appellant, saw the collision and he too locates the place of the collision. (Apostles, pp. 910 to 939.) *Goodell* (Apostles, pp. 796 to 865), who was aroused by the bell from full speed to full speed astern, rushed on deck and saw the collision, though he did not see the actual impact. He



locates the place of the collision and concurs with Jordan. *Fred Pederson*, oiler and fireman on the "Samson," was an eye witness and testified (*Apostles*, pp. 1007 to 1051). He was *sitting in the doorway on the port side of the "Samson" when he heard the "Henderson" whistle and went out on deck and could not see the "Henderson" or oil barge until he walked forward and got very near the forward end of the house* (p. 1008). He heard all the signals and saw the "Henderson" and oil barge approaching, saw the vessels come together, saw the oil barge go by; indeed, he may be said to be the witness who was in the position to observe everything. Ample opportunity was afforded to cross examine this witness, but his testimony was not at all affected or shaken by the cross examination. This man had been a seafaring man for seven years, was on duty at the time of the accident and was in a position to see everything. It is peculiar that proctor in his brief does not mention or refer to the testimony of this witness, but states boldly that there were only two men on the "Samson" who saw the collision, the courses of the boats, or located the collision near Puget Island,—Jordan and the helmsman, Peterson, whereas the record shows that Pederson, as well as Peterson, the former the oiler and the latter the helmsman on the "Samson," both saw the accident and both were in position to see the courses of the vessels.

The appellee in its brief pays little attention to the "silent evidence" of the rock barges, but much stress is laid upon the testimony of the fishermen as to where they located the rock barges. Something is said about the rock barges while drifting tending toward the Puget Island shore, because at that time they were going under a port helm. It must be remembered that the "Henderson" was backing under a port helm, yet she seemingly swung toward Prairie Channel and the rock barges swung toward Puget Island. The testimony of the fishermen is the oral testimony on behalf of the appellee as to the location of the rock barges. As said in the former brief, these witnesses were unable to state whether or not there was even a light on any of these barges while at anchor. This one fact is sufficient to discredit their evidence. The fact that they testify so positively as to the location of the collision when they admit that they were three-quarters of a mile to a mile away wholly discredits the testimony of these witnesses in all particulars. Furthermore, these "independent" witnesses know so little about what occurred that of two in one boat, *one is positive that he saw only the red light* of the "Samson," and *the other only the green light* of the "Samson." The *other two men in the other boat could not testify that they saw any lights on the "Samson,"* except possibly the range lights. The one thing by which a vessel upon the water on a dark night

is located is the light which it carries, and yet these witnesses are so intelligent that they cannot say that they ever saw any light on any of these barges. On the other hand, the testimony of all the crew of the "Samson" and of the captain of the "Hercules" and of the officers of the "Kern" show conclusively that each of the outside barges carried a white light that night, and the testimony of the officers and crew of the "Samson," including Merjano, the barge man on Barge No. 9, establishes beyond any question where the rock barges were anchored in the morning and the fact that they carried lights. The "silent evidence" of the rock barges, therefore, is most conclusive.

## THE DAMAGES

The appellee in its brief seemingly takes a most inconsistent position on the matter of damages. It claims (p. 52) that this was a libel for a total loss, and on page 65 that there should be entered a reasonable allowance for demurrage. Judge Cushman in his opinion admits that "the amount charged for the boats in the salvage appears high," but allows the claim because the appellee "had immediate and urgent need for these boats and had to interrupt other employment in which the boats were engaged in order to secure their services." This the appellant submits is an erroneous basis for the assessment of damages. The reasonable rental value of so

many boats as were necessary for the work of salvage is all to which the appellee is entitled. In a former brief the appellant has shown that this vessel could have been raised for \$5,000.00 and that this was a reasonable sum to have been allowed for raising the vessel. It is further shown that the vessel could have been repaired and made as good as it was before the collision for a sum of between \$15,000.00 or \$16,000.00. Under this evidence, the appellee would not have been entitled to recover for a total loss and would have been entitled to recover the cost of repairing the "Henderson." Even the witnesses for the appellee, as shown in the former brief, admit that the hull could have been repaired, but they say it was "bad business policy to repair the hull, as she could only last two or three years more anyway." The damages, therefore, the appellant submits, should have been limited to the amount which it would have cost to put the "Henderson" in as good condition as she was before the accident. The libel is upon the wrong principle. If the libel had been based upon the facts as proved that the "Henderson" was not a total loss, but was capable of being repaired, then the libellant would have been entitled to recover from the party at fault the amount which it would have reasonably cost to repair the "Henderson," plus demurrage, the demurrage not to exceed the sum which she was earning per diem and demurrage for no longer period than was necessary to raise



the "Henderson" and make the repairs. It is probable that this could have been done in a month at furthest.

Again, the testimony is overwhelming as to the value of the "Henderson" at the time of the collision. The rule of law is recognized by the proctor for the appellee that the true measure of damages in event of the total wreck is the market value of the boat at the time of the collision. Many witnesses testify regarding this. Hosford and Shaver testify entirely as to what the boat would have been worth or was worth to the libellant for the work which the libellant had on hand and in which the boat was engaged. This is no true measure of damages.

Respectfully submitted.

TEAL, MINOR & WINFREE,  
ROGERS MACVEAGH,

*Proctors for Claimant.*



IN  
**The United States Circuit  
Court of Appeals**  
for the Ninth Circuit

**THE STEAMER "SAMSON" and BARGE No. 8,  
BARGE No. 9 and BARGE No. 27**

**COLUMBIA CONTRACT COMPANY,  
a Corporation  
CLAIMANT AND APPELLANT**

**SHAVER TRANSPORTATION COMPANY,  
a Corporation  
LIBELLANT AND APPELLEE**

**STANDARD OIL COMPANY OF CALIFORNIA,  
a Corporation  
RESPONDENT IN PERSONAM**

**Supplemental Brief on Behalf of  
Libellant and Appellee**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON**

**C. E. S. WOOD,  
ERSKINE WOOD,  
Proctors for Libellant**

**WIRT MINOR,  
ROGERS MacVEAGH,  
Proctors for Appellant**

**ZERA SNOW,  
GEORGE B. GUTHRIE,  
IRA A. CAMPBELL,  
Proctors for Standard Oil Co.**

**FILED**  
JUN 8 - 1914





**In the United States Circuit  
Court of Appeals  
for the Ninth Circuit**

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THE STEAMER SAMSON, and BARGE No. 8,  
BARGE No. 9 and BARGE No. 27.

COLUMBIA CONTRACT COMPANY,  
a Corporation,  
*Claimant and Appellant.*

SHAVER TRANSPORTATION COMPANY,  
a Corporation,  
*Libellant and Appellee.*

STANDARD OIL COMPANY OF CALIFORNIA,  
a Corporation,  
*Respondent in Personam.*

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**Supplemental Brief on Behalf of  
Libellant and Appellee**

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*Appeal from the District Court of the United  
States for the District of Oregon.*

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We feel that this brief is really unnecessary, but our duty not only to present the case of our client but to aid the court to the best of our ability, compels us to put before your Honors in

this manner two points which are not in our main brief and which we intended to cover at the oral argument. The allotted hour, however, was too short to discuss all of the many questions of fact in this case and therefore one of these points was barely touched upon in the last closing minutes of argument and the other was omitted entirely.

**FIRST POINT: THAT PILOT SULLIVAN OF THE OIL BARGE DID NOT BLOW A DANGER SIGNAL.**

On pages 102 to 108 of appellant's brief counsel has urged that, even conceding the collision took place at Hunts Mill Point as we contend, yet Pilot Sullivan of the oil barge was negligent in blowing the second passing whistle when at that very time he was becoming apprehensive; counsel urges that he should have blown the danger signal at that time and that his failure to do so constitutes negligence on the part of the oil barge, making a division of the damages necessary under the familiar rule.

In considering this, it is necessary to bear in mind two things. First—would the danger signal have been the proper signal? Second—if it would have been the proper signal, did the failure to give it contribute to the collision?

The danger signal was not the proper signal. Sullivan had blown one whistle, which had been accepted by the Samson, so the courses of the

two boats were agreed and understood. When Sullivan blew the second whistle he did not "fail to understand the course or intention" of the *Samson* (the only contingency in which the Pilot Rules provide for a danger signal). The course and intention of the *Samson* were clear, for she had accepted the first whistle; but Sullivan wanted to warn the *Samson* that she was crowding him toward the Oregon shore and that it was time the *Samson* should begin to execute the manœuvre of passing port side to port side. There was still time and space to effect this passage—the boats were five hundred feet apart—and Sullivan had a perfect right to rely upon the *Samson's* previous acceptance of the single whistle, and that she would haul off at the proper time.

It is noteworthy that at the time of this second passing whistle Sullivan's anxiety was not of collision but of getting aground. He still thought the *Samson* would pass. (Apostles, pp. 108-109, 178, 179, 185-190.) And the one whistle was given as the best means of communicating to the *Samson* that the oil barge was getting close to shore, and it was time for the *Samson* to commence to haul off to her right as agreed. We submit that the second passing whistle was the proper signal and that the danger signal at this time would have been improper.

Second—even if the failure to blow the danger signal be considered as an error, did it con-

tribute to the collision? It certainly did not. Jordan says he was already backing full speed astern at this time. That is all he could have done had he received a danger signal. So whether it was given or not made not a particle of difference in his conduct. A danger signal is a means of *communicating* to the *other* pilot that his course or intention is not understood. On receipt of it he is *compelled* to reverse and back full speed astern. (We believe the rules have since been changed in this respect.) That is what Jordan was doing; so what good would a danger signal have done him?

Counsel have not stated that Sullivan should have backed, but only that he should have blown the danger signal—*i.e.*, communicated to Jordan. If, however, counsel means it to be inferred that he should have backed at this time, we answer that such a manœuvre would have been, in our opinion, not only a violation of the rules of navigation but its probable result would have been to check the oil barge enough so that she, instead of the Henderson, would have been struck and the damages of this collision would have been far greater than they now are.

We have shown in our main brief (pages 37 and 38) that the negligence of the Samson, even judged by Jordan's own testimony, was gross, and that being so the Samson cannot bring about a division of damages by raising doubts as to



the conduct of the oil barge. It is said in the case of the *Victory*, 18 Sup. Ct. Rep. 149, 155:

“As between these vessels, the fault of the *Victory* being obvious and inexcusable, the evidence to establish fault on the part of the *Plymothian* must be clear and convincing, in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other.

“The recognized doctrine is thus stated by Mr. Justice Brown in *The Umbria*, 166 U. S. 404, 409, 17 Sup. Ct. 610: ‘Indeed, so gross was the fault of the *Umbria* in this connection that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211, and *The Ludvig Holberg*, 157 U. S. 60, 71, 15 Sup. Ct. 477, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor.’ ”

The court said further:

“The Circuit Court of Appeals and the District Court arrived at different conclusions in respect of the *Plymothian*’s entire freedom from fault. The District Court held that the *Plymothian* was without blame, while the Circuit Court of Appeals was of opinion that she was not wholly blameless, because she kept her course ‘without taking any precaution whatever until too late, and when the pending col-

lision became inevitable.' Whether she may not have been slightly in fault, may be a close question. This is often so when subsequent knowledge of what might have prevented disaster tends to qualify the ~~injury~~<sup>inquiry</sup> as to the prior duty to avert it. But, after all, the question is, as pointed out by Mr. Justice McLean in *Williamson v. Barrett*, 13 How. 101, whether it was the duty of the master, in the exercise of due care and caution in the management of his vessel, to give a particular order. And, on a careful consideration of the evidence, we think that the *Plymothian* was not bound to change her course, or to stop and reverse earlier than she did, and these are the only elements of fault imputed to her."

In connection with our claim that the *Samson* was grossly negligent for continuing to approach the oil barge at a speed of at least seven miles an hour down a strong current with an unwieldy tow, it is interesting to note that in this very case of the *Victory* the Supreme Court held the *Victory* at fault for going at a speed of five and one-half and seven knots an hour with a tide force of two knots. In condemning this conduct the court said:

"Testing the *Victory's* conduct by settled rules, she was plainly in fault for not keeping to the right, and in attempting to cross the *Plymothian's* course, and her speed renders

her conduct still more blameworthy. It does not seem to be controverted that at the time of leaving the lighthouse her speed was five and one-half knots through the water, and there was a tide force of two knots, which would make seven and one-half knots over the ground. The Circuit Court of Appeals found that, from Craney Island up, her speed through the water was six or seven miles an hour, with a two-mile tide assisting her, which would make her speed over the bottom eight or nine miles. Certainly she must be held to have known that she was approaching the Plymothian so as to involve the risk of collision, and should have slackened her speed, under rule 21, and have stopped and reversed sooner than she did, when she was informed by sight and hearing that her effort to crowd the Plymothian off her rightful course must be unsuccessful."

SECOND POINT: THAT SULLIVAN SAW BOTH LIGHTS OF THE SAMSON ALL THE TIME.

Appellant has based his appeal largely on the fact that Sullivan saw both side lights of the Samson continuously from the time she came in sight up in Bugby's Hole till the collision. This, counsel says, shows conclusively that our theory of the collision is impossible. On the contrary, it corroborates us. We touched on this point at the close of our oral argument, but so

hurriedly that we take this occasion to state our position more fully.

It only takes a glance at the charts of the river on file in this case to see that the current at Bugby Hole sets against the bluff; and this is the testimony of the river pilots. It only takes another glance at the charts to see that the natural tendency of the Samson swinging around the bend at a speed of seven miles an hour down the current of a June freshet, with a tow which she could hardly control, would be to be "set over" by the current toward the Oregon shore. This is apparent without the testimony of Pilot Jordan of the Samson. As a matter of fact, however, he has said repeatedly that such was the case. One instance is at Apostles, pp. 654-655, where he testified as follows:

"Q. Then you had proceeded from the point 'B,' which is approximately 400 feet off this Puget Island shore, to the point 'F,' which is approximately 800 feet off the Puget Island shore, on a port helm all the time, and hadn't got— Instead of getting nearer to the island shore you had got further away from it.

"A. I think she drifted down, yes, sir.

"Q. Drifted down?

"A. Away from the island, on account of the current setting her off."



He said again, on page 1114 of the Apostles, as follows:

“Q. I understand you, Captain, in rounding the point of Puget Island, that your vessel comes down, not straight down, but sort of sideways. Is that correct?

“A. That is correct.

“Q. That is usually the case, is it?

“A. Ordinarily, yes.”

Compare also his testimony, quoted on pages 38 and 39 of our main brief, where he says that the Samson would not shove the scows over toward Puget Island. Also his testimony on page 765 of the Apostles, where he again speaks of the current setting him away.

It is evident that the Samson's course from the point where Sullivan first saw her to the place of the collision was not along a straight line drawn through her keel and projected forward to the place of collision. In other words, she was not *headed* directly for the place of collision. She was *headed* more down stream, and the momentum with which she rounded the bend, and the sweep of the current toward the bluff, kept setting her over toward the place of collision. As the oil barge hauled off to the right, and proceeded toward the place of collision, the Samson kept being set over so that she continually remained pointing at the oil barge, and of course both her side lights remained visible

to Sullivan until just before the collision. And that is the way he describes them. (Apostles, pp. 107, 108, 163.) So far from militating against our theory of this collision, the appearance of the Samson's lights, when one understands the bend of the river at this point, the current, and how the Samson was set over, as Jordan says, corroborates us exactly.

Moreover, it must be borne in mind that the vessels were nearly two miles apart at the first sight and that the Samson's side lights shone across her course at a slight angle, as illustrated in the diagram numbered 3 in appellant's brief. This would make them visible to the oil barge, two miles away, through quite an arc of a circle.

Respectfully submitted.

C. E. S. WOOD,  
ERSKINE WOOD,  
*Proctors for Libellant.*

No. 2393

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IN  
**The United States Circuit  
Court of Appeals**  
for the Ninth Circuit

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**THE STEAMER "SAMSON" and BARGE No. 8,  
BARGE No. 9, and BARGE No. 27**

**COLUMBIA CONTRACT COMPANY**  
CLAIMANT AND APPELLANT

VS.

**SHAVER TRANSPORTATION COMPANY**  
LIBELANT AND APPELLEE

**STANDARD OIL COMPANY OF CALIFORNIA,**  
a Corporation  
RESPONDENT IN PERSONAM

---

**Petition for Rehearing of Appellant**

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON**

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**TEAL, MINOR & WINFREE,  
ROGERS MAC VEAGH,**  
Proctors for Claimant and Appellant





In the United States Circuit  
Court of Appeal  
for the Ninth Circuit

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THE STEAMER "SAMSON" AND BARGE No. 8,  
BARGE No. 9, AND BARGE No. 27,

COLUMBIA CONTRACT COMPANY,  
*Claimant and Appellant,*

*vs.*

SHAVER TRANSPORTATION COMPANY,  
*Libelant and Appellee,*

STANDARD OIL COMPANY OF CALIFORNIA,  
a Corporation,  
*Respondent in Personam.*

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Petition for Rehearing of Appellant

---

*Appeal from the District Court of the United  
States for the District of Oregon.*

## SUMMARY

- I. RULING BELOW WAS MADE ON EX-  
CEPTIONS TO LIBEL — BRIEF OF  
CLAIMANT AND APPELLANT HEREIN  
at page 3
- II. THE BARGES WERE ENTIRELY DE-  
PENDENT ON THE "SAMSON" . . at page 5
- III. "*THE TUG JOHN COOKER AND THE  
BARGE JAMES W. EATON*" . . . . at page 6
- IV. THE RULE OF "*STURGIS v. BOYER*"  
at page 8
- V. LIMITATION OF LIABILITY IMPOS-  
SIBLE TO DETERMINE UNDER THE  
DECISION, UNLESS MODIFIED . at page 11
- VI. CONCLUSION . . . . . at page 16

Comes now COLUMBIA CONTRACT COMPANY, the above-named Claimant and Appellant, and makes application for a modification of the order and judgment heretofore in this case rendered by this honorable Court in the following particulars, to wit:

That said order and judgment herein, made and filed on the 13th day of October, 1914, affirming the decree of the Court below, be so modified as to direct that the said decree of the Court below be reversed as to BARGE No. 8, BARGE No. 9, and BARGE No. 27, and that the cause be remanded for further proceedings not inconsistent with such modification.

This petition is based upon the following grounds:

# I.

## **Ruling Below was Made on Exceptions to Libel — Brief of Claimant and Appellant herein.**

The reasons for which the Court below held the barges responsible with the "Samson" are very briefly stated in the opinion of that Court (Apostles, p. 62) as follows:

"It has already been held herein that the three stone barges would be responsible with the 'SAMSON' for any damage from the latter's fault. (The John Cooker, Fed. Case No. 7337.) In view of the fact that the 'SAMSON' and the stone barges were both owned and claimed by

the present claimant, taken in connection with other circumstances of the case, the court must adhere to the former ruling.”

The “former ruling” referred to by the Court was made on exceptions raised by Claimant below (Claimant and Appellant herein) to the libel with regard to the liability of the barges. At that time no evidence was before the Court, and it may well be conceded that in overruling the exceptions the Court was simply following out the general admiralty principle of refusing to exclude before final determination anything that might affect the issue as a whole. But we submit that such a decision, rendered before trial, should not, and in the case at bar must not, control the final judgment. No reasons are given in the final judgment by the Court below for such decision, other than those stated in the paragraph quoted above (Apostles, p. 62). These, we submit, were fully met and answered in the brief for Claimant and Appellant herein (pp. 125-129, VII); but lack of time upon the argument before this Court made it impossible for proctor for Claimant and Appellant herein to argue this particular point *viva voce*. We have no desire or intention of multiplying argument and citation in this already voluminous proceeding; but we feel convinced that a general affirmance of the decree below, such as is effected by the judgment of this Court as it now stands herein, will result, not only in grave injustice, but also in the estab-



lishment in this Circuit of a precedent utterly at variance with the established law of admiralty and the fundamental rules of justice and good sense. We therefore feel justified in presenting the matter, very concisely, to this Court, and in urging it most earnestly to modify in the manner indicated its judgment and order herein.

## II.

### **The Barges were Entirely Dependent on the "SAMSON."**

Reference has hereinabove been made to the brief heretofore filed in this Court on behalf of Claimant and Appellant herein, pp. 125-129, VII. We do not believe that any useful purpose will be served by again going over the ground covered in those pages, and we therefore, for brevity's sake, refer this Court, in support of this petition, to that portion of our said brief. Particularly do we ask for a careful examination of the quotation from Spencer (Marine Collisions, 1895 ed., section 122, p. 261) and of the five cases cited.

It must be continually borne in mind—and this is the crux of the whole question—that **the "SAMSON's" barges at no time had any motive power or steering-control of their own.** They were helpless, uncontrolled hulks, lashed to the "SAMSON" so as to form, with her, one vessel, **and that vessel the "SAMSON."** By this, of course, it is not meant that the barges were actually a part of the "SAMSON," her tackle, apparel, or

furniture. But, so far as their navigation and control was concerned, they were utterly dependent upon the "SAMSON" for their every move. It is familiar law that a tow may be separately liable for a collision; but, as pointed out on page 128 of our brief cited *supra*, such cases are those where the tows are "hawser-tows"—fastened **behind** the tugs by a line or lines—and therefore needing to be and actually steered independently of their tugs. It is not believed that a single case can be found in the books where a tow, lashed to a tug and absolutely under its control, both as to speed and as to steering, has been held liable for a collision caused by the act or negligence of the tug.

### III.

#### **"The Tug John Cooker and the Barge James W. Eaton."**

The case upon which, apparently, the Court below based its decision holding the barges liable—the fact that Claimant and Appellant herein owned both the "SAMSON" and the barges being specifically noted (see excerpt from opinion, quoted *supra*)—is

*The Tug John Cooker and the Barge James W. Eaton,*

10 Benedict, 488; 13 Fed. Cas., 665 (Fed. Case No. 7337),

Dist. Ct., E. D. N. Y., 1879.

In that case the tow was a "hawser-tow," and Judge BENEDICT **held** that the collision was due to the fault of the tow, and that, as a single stipulation for value had been given by the claimant to cover both tug and tow, it was unnecessary to determine **as between the tug and the tow which was responsible for the collision.** In other words, either might by its own independent acts have caused the collision; but **can it be for one moment contended that the "SAMSON'S" barges rammed or could have rammed the "HENDERSON" independently of the "SAMSON"? The barges were completely dependent on the "SAMSON" for their every move.** Such being the case, the fact that, for the sake of convenience, one stipulation was filed by Claimant below to cover both the "SAMSON" and the barges cannot under any conceivable theory of law or practice operate to make liable as independent entities what were in fact utterly dependent ones.

We have laid great stress on these considerations, and we have done so advisedly. The unqualified affirmance of the judgment below will result in a total subversion of one of the most ancient and fundamental axioms of admiralty. No vessel that is not in command of her own movements, but is a mere instrument in the hands of another vessel or of the elements (always provided, of course, she has not been nor is negligent in becoming subject to such ex-

ternal control), can be held liable for damage done through her as such instrument by a force foreign and external to her. This is the law, rooted alike in authority and in reason; and Libelant and Appellee herein should not be heard urging this Court to disregard it and to assert, by simply affirming without modification the decree below, a new and most unsound doctrine—one which will give rise to the gravest doubts and most troublesome questions throughout the domain of maritime law and practice.

#### IV.

#### **The Rule of “Sturgis v. Boyer.”**

Fortunately this very question has been definitely passed upon by the Supreme Court of the United States; and it is perhaps owing to this fact that proctors for Libelant and Appellee herein have not, in their brief filed with this Court, touched this point at all. In

*Sturgis v. Boyer,*

65 U. S. (24 How.), 110; 16 L. C. P. Co. ed., 591,

U. S. Supr. Ct., 1860,

the jib-boom of a ship lashed to a tug upset a loaded lighter. The ship was under the exclusive control of the tug; and in holding the tug solely in fault **and solely liable in damages** Mr. Justice CLIFFORD, speaking for the Court, said (at pp. 594-596 of 16 L. C. P. Co. ed.):



"Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction and management of the master and crew of the tow. Fault in that state of the case cannot be imputed to the tug, provided she was properly equipped and seaworthy for the business in which she was engaged; and if she was the property of third persons, her owners cannot be held responsible for the want of skill, negligence or mismanagement of the master and crew of the other vessel for the reason that they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those intrusted with the navigation of the vessel the relation of the principal. **But whenever the tug, under the charge of her own master and crew, and in the usual**

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Emphasized type ours.

**and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master or crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means.** \* \* \* \*

A vessel properly secured may, by the violence of a storm, be driven from her moorings and forced against another vessel, in spite of her efforts to avoid it, and yet she certainly would not be liable for damages which it was not in her power to prevent. So, also, ships at sea, from storms or darkness of the weather, may come in collision with one another without fault on either side, and in that case must each bear its own loss, although one is much more damaged than the other. *Stainback v. Rae*, 14 How., 532. Applying these principles to the present case, it is obvious what the result must be. Without repeating the testimony, it will be sufficient to say, that

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Emphasized type ours.

it clearly appears in this case that those in charge of the steam tug had the exclusive control, direction and management of both vessels, and there is not a word of proof in the record, either that the tug was not a suitable vessel to perform the service for which she was employed, or that anyone belonging to the ship either participated in the navigation, or was guilty of any degree of negligence whatever in the premises."

This language is too clear to need comment or exegesis; and we submit it as conclusive in favor of Claimant and Appellant herein on the question raised by this petition.

## V.

### **Limitation of Liability Impossible to Determine under the Decision, unless Modified.**

The importance, indeed the necessity, of some specific determination by this Court of the liability (if any) attaching to the barges becomes evident in considering the application of this judgment, as it now stands, to proceedings for limitation of liability under Section 4283 of the Revised Statutes of the United States. The principle underlying such limitation is too well known and too firmly established to need comment or support. Suppose, now, that Claimant and Appellant herein should desire to invoke the

statute and limit its liability: what would be its position? There is no question but that such limitation could be taken advantage of. In the leading case of

*New York & Wilmington S. S. Co.,*  
*"The Benefactor,"*

103 U. S. (13 Otto), 239 and 247; 26 L.  
 C. P. Co. ed., 351 and 466,  
 U. S. Supr. Ct., 1887,

Mr. Justice BRADLEY said (at pp. 353-354 of 26 L. C. P. Co. ed.):

"Precisely when the owners of a ship in fault ought to be regarded as precluded from instituting proceedings for a limitation of liability might be difficult to state in a categorical manner. **Perhaps they can never be precluded so long as any damage or loss remains unpaid.**"

This doctrine was later reaffirmed by the same Justice, in the case of

*Place v. Norwich & N. Y. Transportation*  
*Co.,*

*"The City of Norwich,"*

118 U. S. 468 and 526; 30 L. C. P. Co.  
 ed., 134,  
 U. S. Supr. Ct., 1886,

where (at p. 142 of 30 L. C. P. Co. ed.) he said, speaking of the trial below in the case then at bar:



“The trial on the merits resulted in determining which vessel was in fault, and in liquidating the amount of damage sustained by the libelants, to be used as a basis of their *pro rata* share in the fund which might ultimately be decreed, subject to their claim and the claims of other parties. It did not settle the amount of that fund, nor the extent of the liability of the owners of the steamer. In the case of *The Benefactor*, 103 U. S. 239 (Bk. 25,\* L. ed. 351), this matter was fully considered, and we held that ‘The amount recovered, whether before the limitation proceedings are commenced or afterwards, and whether in the court of first instance or an appellate court, will stand as the recoveror’s basis for *pro rata* division when the condemned fund is distributed. In all other respects the proceedings for obtaining a limitation of liability may proceed in the ordinary course.’ ”

Of this rule as laid down by the Supreme Court of the United States Mr. Spencer says:

“Neither the law nor the rules of practice prevent a party from invoking the benefit of the act at any time prior to actual payment of the owner’s liability and satisfaction of the injured party’s demand. The rule stated in ‘*The Benefactor*’ affords the owner the most liberal opportunity to enjoy the provisions of

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\*So in text.

the statute, and **nothing short of actual payment has yet been held sufficient to preclude an owner from claiming the benefits of the act.**"

(Spencer on Marine Collisions,  
1895 ed., §216, pp. 392-393.)

And again:

"The weight of authority is to the effect that the owner may abandon the vessel at any time, so long as he has not expressly renounced his right to do so, or has not pursued a line of conduct incompatible with the exercise of the right."

(Idem., §216, p. 396.)

See also 36 Cyc., 424.

Thus, Claimant and Appellant herein has the right to invoke the statute and limit its liability for the collision with the "HENDERSON"—but to what shall such liability be limited? To the value of the "SAMSON"? To the value of BARGE No. 8? BARGE No. 9? BARGE No. 27? Or of a combination of them? Or of them all? Obviously a mere affirmance of the judgment below, which held the "SAMSON" liable for the collision **and the barges liable with her**, will not dispose of these questions. **If the barges are considered as responsible for the collision, it can only be on the theory that the barges did the damage.** It is important to note that the decisions of both this honorable Court and the Court below are

silent as to which and how many barges did the damage. One barge—the starboard one—admittedly never touched the “HENDERSON.” If the barges are held to have occasioned the loss, plainly their Claimant’s liability is limited to their value alone. Consequently it is necessary to determine which barges, if any, did the damage. If, on the other hand, the “SAMSON” is held liable, it is clear that under the law as indicated in the foregoing portions of this petition the “SAMSON’s” value alone is the measure of the limitation; **yet the decision below, as affirmed without modification, holds the barges “responsible with the ‘SAMSON’ for the latter’s fault.”** The result is that the limit of liability on a collision for which the barges are “responsible” jointly with the “SAMSON” would be simply the value of the “SAMSON”; while if the barges are considered to have caused the loss (the only ground on which they can be held responsible), the limit of liability for such loss would be simply their value, although the “SAMSON” has been held in fault for the collision! This logical *impasse* has been caused by a confusion in the treatment of the “SAMSON’s” tow. This is not a case where the tow was free to choose between different courses of action, even within narrow limits, as in “*The John Cooker*” above referred to. Here the barges, as has been said *supra*, though separate entities for the purpose of limiting liability, were mere instruments of the

"SAMSON" in doing the damage. Liability for such damage, therefore, must attach either to the "SAMSON" or to them—it cannot attach to both. **A passive instrument in the hands of an active agent cannot be considered as in any way contributing to or jointly liable for the agent's own act.**

The logical solution is to make it clear that the barges are not liable for the collision. Under this view the difficulties now created by the judgment herein will disappear, and the limit of liability be fixed at the value of the "SAMSON"—the only vessel that can properly be held liable.

## VI.

### **Conclusion.**

We do not ask for a rehearing on the question of the liability of the "SAMSON" nor upon the law as applied by this Court to the evidence with regard to the other features of the case at bar. We ask only that the judgment and order herein be so modified as to make it clear that no liability attaches thereunder to BARGE No. 8, BARGE No. 9, and BARGE No. 27, and that the cause be remanded for further proceedings not inconsistent with such modification.

Respectfully submitted,

TEAL, MINOR & WINFREE,  
ROGERS MAC VEAGH,

*Proctors for Claimant and Appellant.*



STATE OF OREGON,  
District of Oregon,  
County of Multnomah, } ss.

I, WIRT MINOR, of proctors for Claimant and Appellant in the above entitled cause, hereby certify that in my judgment the foregoing petition is well grounded, and that the same is not interposed for delay.

Portland, Oregon, November 5, 1914.

WIRT MINOR,  
*Of Proctors for Claimant and Appellant.*



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

Transcript of Record.  
(IN TWO VOLUMES.)

COLUMBIA RIVER PACKERS' ASSOCIA-  
TION, a Corporation,

Appellant,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and I. N.  
STENSLAND,

Appellees.

VOLUME I.  
(Pages 1 to 352, Inclusive.)

Upon Appeal from the United States District Court  
for the Western District of Washington,  
Southern Division.

Filed

JUL 1 - 1914

F. D. Monckton,  
Clerk.





No. 2396

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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Transcript of Record.

(IN TWO VOLUMES.)

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H. S. MCGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and I. N.  
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VOLUME I.

(Pages 1 to 352, Inclusive.)

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Upon Appeal from the United States District Court  
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**Names and Addresses of Counsel.**

G. C. FULTON, Esquire, Astoria, Oregon,  
Solicitor for Appellant.

JOHN C. WELSH, Esquire, South Bend, Washing-  
ton;

MARTIN WELSH, Esquire, South Bend, Washing-  
ton;

CHARLES W. DORR, Esquire, Colman Building,  
Seattle, Washington; and

HIRAM E. HADLEY, Esquire, Colman Building,  
Seattle, Washington,  
Solicitors for Appellees. [1\*]

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*In the District Court of the United States, for the  
Western District of Washington, Southern Di-  
vision.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIA-  
TION, a Corporation,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and I. N.  
STENSLAND,

Defendants.

**Praeceptum for Record on Appeal.**

To the Clerk of the Above-entitled Court:

You are hereby directed to take a transcript of rec-  
ord in the above-entitled cause to be filed in the

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\*Page-number appearing at foot of page of original certified Record.

2      *Columbia River Packers' Association*

United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following and no other papers, to wit:

- (1) Amended complaint.
- (2) Bond for injunction.
- (3) Restraining order.
- (4) Answer and cross-complaint of defendant H. S. McGowan.
- (5) Demurrer of plaintiff to cross-complaint of defendant H. S. McGowan.
- (6) Order overruling demurrer of plaintiff to cross-complaint of defendant H. S. McGowan.
- (7) Answer of plaintiff to cross-complaint of defendant H. S. McGowan.
- (8) Replication of defendant H. S. McGowan to plaintiff's answer.
- (9) Stipulation between counsel as to the demurrer to answer and cross-bill of defendants Lindstrom and Coyle and pleadings of such defendants.
- (10) Petition of plaintiff to dismiss this action.
- (11) Opinion of Court on such motion to dismiss action.
- (12) Order denying petition of plaintiff to dismiss.
- (13) Order allowing plaintiff to file supplemental bill of complaint.
- (14) Supplemental bill of complaint of plaintiff.
- (15) Answer of defendants H. S. McGowan to plaintiff's supplemental bill of complaint.



- (19) Order appointing C. D. Savery, Special Examiner.
- (20) Memorandum of decision of Judge Donworth, of date January 6, 1912.
- (21) Decision of Judge Donworth of date January 24, 1912.
- (22) Interlocutory decree of date February 5, 1912.
- (23) Order appointing M. A. Langhorne, Special Master.
- (24) Report and findings of special master.
- (25) Plaintiff's exceptions to report and findings of special master.
- (26) Motion of defendants for confirmation of report of special master.
- (27) Decision of Judge Cushman, of date August 12, 1913.
- (28) Final decree.
- (29) Transcript and evidence.
- (30) Petition and order for appeal and order fixing the amount of appeal bond.
- (31) Assignments of error.
- (32) Bond on appeal and approval thereof.
- (33) Citation on appeal and proof of service thereof.
- (34) Order certifying original exhibits.
- (35) Order extending time in which to prepare, file and serve transcript on appeal.

G. C. FULTON,  
Attorney for Plaintiff.

Due service of the within praecipe is hereby accepted this 3d day of Dec., 1913.

WELSH & WELSH,  
DORR & HADLEY,  
Attorneys for Defendants.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [3]

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*In the Circuit of the United States for the Western  
District of Washington, Western Division.*

COLUMBIA RIVER PACKERS' ASSOCIA-  
TION,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and I. N.  
STENSLAND,

Defendants.

**Amended Complaint.**

The above-named plaintiff complaining of the above-named defendants, by this its amended complaint filed herein by leave of the Court first had and obtained, for its cause of action against said defendants alleges,

I.

That plaintiff is now and during all of the days and dates herein mentioned was a corporation duly organized and existing under and pursuant to the laws of the State of Oregon, and duly licensed as such in ac-

cordance with the laws of the State of Oregon, and was and is a citizen of the State of Oregon. That the office and place of business of this plaintiff is now and at all times has been at the City of Astoria in the County of Clatsop in the State of Oregon.

That this plaintiff is and was at all times herein mentioned duly authorized and empowered by its articles of incorporation to own, possess, and acquire real estate and personal property; and to engage in the business of taking and catching and dealing generally in salmon and other fish for trade and profit; and in the operation of all kinds of fishing appliances in the Columbia River and the waters thereof and [4] elsewhere; and to lease and sell real estate and interest in real estate; and to engage generally in the business of taking, catching, handling, packing, and preserving salmon and other fish and the marketing thereof for profit; and is and has been for many years past engaged in such business at Astoria, in Clatsop County in said State of Oregon.

## II.

That long prior to the institution of this action and of the grievances herein complained of, to wit, on the 9th day of July, 1906, this plaintiff caused to be filed and recorded in the office of the Secretary of State of the State of Washington a certified copy of its articles of incorporation duly certified to by the Secretary of State of Oregon, who was and is the custodian of the same according to the laws of the said State of Oregon, and who was and is authorized to issue certificates thereof, according to the laws of the State of Oregon, and the same was duly attested by the Secre-

tary of State of the State of Oregon under his hand and seal of the State of Oregon.

And on the same date the plaintiff filed in the said office of the Secretary of State of the State of Oregon a writing signed by the vice-president of plaintiff, one of the chief officers of plaintiff, and attested by the plaintiff's corporate seal, wherein and whereby this plaintiff therein constituted and appointed R. A. Hawkins of Ilwaco, Pacific County, in said State of Washington, its agent to accept service of process in any action or suit pertaining to the property, business, or transactions of this plaintiff within the State of Washington, or in which plaintiff should be a party; which said writing contained the name of said agent, namely, R. A. Hawkins, together with his place of residence, to wit, Ilwaco, Pacific County, State of Washington, [5] together with the office and place of business of plaintiff where the business of plaintiff should be carried on in said State of Washington, to wit, Ilwaco, Pacific County, State of Washington; and in all respects duly and fully complied with all of the laws of the State of Washington relating to and governing foreign corporations transacting business in said State; and was thereupon duly authorized to transact any and all business in said State; and according to the laws of the State of Washington was authorized and permitted to generally do and perform every act and transact every kind of business within said State of Washington in the same manner and to the same extent as corporations incorporated and organized under the laws of said State of Washington are authorized to do by the laws of such State.



This plaintiff further alleges that a majority of its stock is owned by citizens of the United States.

### III.

That the defendants are and each is and during all of the times herein mentioned were actual citizens and residents of the State of Washington and each of said defendants resides and did reside during all of the times herein mentioned in the County of Pacific in said State of Washington, and within the jurisdiction of this Court, and within the Western District of Washington, and within the Western Division thereof.

### IV.

That long prior to the institution of this suit and the grievances herein complained of, the United States of America was and still is the owner in fee of that certain tract of land situated and located within the County of Pacific in the State of Washington, the same being an island in the Columbia River near the mouth of said river, which was and is generally known [6] and named upon all official records, maps, and plats as Sand Island; together with all tide lands, water rights, privileges, and easements surrounding and adjacent thereto and bordering thereon; which said island has been in existence for many years and is universally known and described as Sand Island.

That said Sand Island was, by proclamation of the President of the United States, duly issued and published on the 29th day of August, 1863, reserved from sale for military purposes and for military reservation and the same has ever since been held

and reserved as such by the United States.

That, pursuant to an act of Congress, approved July 23, 1892 (27 Stat. 321), granting authority to the Secretary of War, in his discretion, to lease for a period of not to exceed five years such property of the United States under his control as should not for the time be required for public use, the Secretary of War of the United States on the first day of May, 1908, said Sand Island then being under the control of said Secretary of War and then not required for public use, by writing duly executed and approved in the manner provided by law, duly leased to the plaintiff for a good and valuable consideration the following portion of Sand Island, same being designated on the maps and plats of the Government survey as Sites No. 2 and 3, for the term of three years from said date, together with the tide lands, water rights, fishing rights, and riparian rights adjacent thereto to the navigable channel of said Columbia River; which said portion of said island so leased aforesaid and being Sites No. 2 and 3, was and is all the frontage, tide lands, riparian rights, water rights, and privileges south, and the high lands north of a line drawn on the line of low-water mark on the Columbia River on the south side of said island beginning at a point 4,000 feet easterly along low-water mark from a point on low-water mark [7] due west of the United States Monument No. 4 erected on Sand Island by the United States Government surveyors, and so marked; thence easterly along the said shore line to the east boundary line of Site No. 4 on said Sand Island, said point being a

point on said low-water line that would intersect a north and south line 781 feet distant east of the United States Monument No. 6 erected on Sand Island by the United States Government surveyors, and so marked.

That upon the execution and delivery of said issue aforesaid this plaintiff immediately entered into the possession of said premises and of the whole thereof.

That said Sand Island and the premises described in said lease, namely the said Sites No. 2 and 3 above the line of low-water mark consists of a sandy beach up to the line of high water and then it is composed entirely of sand, practically no vegetable grows thereon and the same is not susceptible to cultivation or agricultural uses and contains no minerals or phosphates of any kind. That the bed of said river below said low-water mark is quite level with a hard sandy bottom with quite a gradual slope for a short distance into deep waters. That said Sites 2 and 3 aforesaid are on the south side of said Sand Island and are on the north shore of the main ships' channel of the Columbia River and within the jurisdiction of this Court and within the Western District and Western Division thereof, and that the main channel of the Columbia River washes said shore of said island where said waters are navigated by all the ocean-going vessels, and all the vessels that carry the commerce of Washington and Oregon navigate such waters.

That said premises are and at all times have been of great value for the right of fishery thereon and the right to [8] haul and land seines thereon and in



front thereof, and to operate seines from the shore into the waters thereof and to haul same on the shore thereof for the purpose of catching salmon fish during the salmon fishing season of each year on said river.

That said premises were leased to this plaintiff by the said United States through the Secretary of War for the sole purpose of being used and employed as a fishery and for the sole purpose of operating seines for catching salmon fish from the shore in the waters of said river and landing the same on the shores.

This plaintiff further alleges that, under the laws of the United States, the said waters are required to be kept free from obstructions and that by virtue of said laws and said lease aforesaid plaintiff is entitled of right to have said waters and said channel of said river free and unobstructed; and is entitled of right to the free, unobstructed ingress to and egress from said premises; and is entitled of right to the exclusive right of operating seines for the purpose of catching salmon fish from said shores in the waters of said river and landing the same on said shores.

Plaintiff further alleges that heretofore and on the 30th day of June, 1908, pursuant to the laws of the State of Washington, this plaintiff duly applied to the Fish Commissioner of the State of Washington for a license to operate three seines upon said Sites 2 and 3 aforesaid, and then and there paid the said Fish Commissioner the license fee exacted by the said Fish Commissioner and the laws of the State of Washington, to wit, the sum of \$15.00 for license N. 2391 and \$15.00 for license No. 2392 and \$15.00 for



license No. 2393. Thereupon said Fish Commissioner [9] duly issued to plaintiff three licenses to operate seines in the Columbia River, numbered respectively 2391, 2392 and 2393; and thereupon this plaintiff was entitled of right to operate three seines in the waters of the Columbia River within the State of Washington from said date and for the period of one year thereafter.

That, on the second day of July, 1908, whilst said lease was in full force and effect, this plaintiff entered upon the said leased lands aforesaid, namely said Sites 2 and 3 on said Sand Island, together with its three seines and seining outfit, having made preparation to engage in the business of employing said leased premises in the operation of said seines for the purpose of taking and catching salmon fish.

That in order to operate seines in front of said Sites 2 and 3 it is necessary that the waters and channel of said river be free and unobstructed, for that it is necessary to lay each seine out into the waters of said river a distance of two or three hundred fathoms, each seine being about that long, and to permit the same to drift with the tide and current and then to haul the same in on the shore. That plaintiff was proceeding to so operate its said seines, under its licenses aforesaid and under the same lease aforesaid, when the defendants herein wrongfully and unlawfully and in violation of plaintiff's rights and in violation of the laws of the United States which prohibits the placing of any obstructions in the navigable waters of said river, and without the consent of plaintiff, but against plaintiff's consent, placed in

the channel of said navigable waters of said Columbia River directly in front of plaintiff's leased premises and in front of said Sites 2 and 3 aforesaid, certain obstructions to the navigation of said waters consisting [10] of large stones to which were attached wire cables and chains and large timbers for a float or buoy. That said obstructions were seven in number and were placed in the waters of said river about fifty to one hundred feet from the shore and about two or three hundred feet apart. That said stones and anchors, or weights, were large and of great weight and were so placed that plaintiff could not operate its seines in the waters of said river and could not land its seines or either thereof on the shores of said leased premises and absolutely prevented plaintiff from operating seines on said lands and excluded the public generally from operating either gill nets, drift nets, or seines in the waters of said river.

That plaintiff thereafter and on the 2d day of July, 1908, at great labor and expense and time, removed all of said obstructions and was proceeding to operate its seines in said waters in front of said premises and land the same on the shores thereof when the said defendants, again on the 4th day of July, 1908, wrongfully and unlawfully and in violation of the laws of the United States aforesaid and against plaintiff's consent, placed six more of said obstructions in front of said premises aforesaid in practically the same position as those plaintiff removed, that is to say, that each of said obstructions consisted of a large stone or stones of great weight

to which were attached wire cables and chains, and the same were placed on the bed of the river and the float or buoy of large timbers were attached at the end of said cables; and that said obstructions were placed from fifty to one hundred feet from the shore of said Sites 2 and 3 and from two to three hundred feet apart and in such a position as to absolutely prevent plaintiff from operating its said seines and to prevent plaintiff from landing its seines or any seine on said shore. [11]

That said obstructions are in the navigable waters of said river and are so placed as to prevent the free ingress to and egress out from said premises and interferes with and prevents free access to said premises.

That the defendants threaten to and will, unless restrained by this Court, continue to place other of said obstructions in said waters in front of said premises; and threaten to continue to use and employ the same and will do so unless restrained by this Court. That said obstructions so placed and those threatened to be placed are not placed for the purpose of trade or commerce or for any particular use, but are placed there for the purpose of harassing and annoying plaintiff and preventing plaintiff from operating its seines and interfering with and obstructing the free ingress to and egress from said premises, and none are placed there in good faith and are and each is an obstruction to the navigation of said river.

This plaintiff further alleges that it has expended for the purchase of seines and appliances necessary to conduct seining operations on said premises and



shores fully \$15,000.00, and has employed and now has in its employ and had in its employ at the institution of this action thirty-four men, and was and is keeping and caring for twenty-four horses, all necessary to be employed and used in operating *and* seining grounds; and plaintiff was and is required to expend each day to maintain said outfit at least \$200.00. That plaintiff is required to pay as rental for said premises the sum of \$5,175.00 per annum. That the salmon fish on the Columbia River are of great value and ascend the river only at certain intervals during each year, and are now in the waters of said river in great numbers, and if the defendants are permitted to maintain said obstructions, plaintiff will not [12] be able to use said grounds or employ its seines and will be irreparably damaged; that the damages will amount to many thousands of dollars, but it is absolutely impossible to measure such damages by money, for it is impossible to ascertain how many fish plaintiff would catch.

That the said trespass herein complained is continuous and the defendants will, unless restrained, continue daily to place said obstructions and other obstructions to the operation of plaintiff's seines, and will daily continue to exercise the exclusive right of fishery in front of said premises and will continue to harass and annoy plaintiff and prevent from ingress to and egress from said premises.

That an emergency exists and plaintiff is entitled to a preliminary injunction enjoining each of said defendants from maintaining said obstructions and from placing any obstructions in front of said prem-



ises or in the waters adjacent thereto, or from interfering with plaintiff's ingress to and egress from said premises and from interfering with the operation of seines on the shores of said sands and from interfering with the landing of said seines.

That the obstructions herein complained of were placed in said waters without any authority from the Secretary of War, or any officer of the Government of the United States, and were placed in said waters in violation of the laws of the United States, and of the State of Washington, and were placed therein as aforesaid for the sole purpose of harassing and annoying plaintiff and preventing plaintiff from ingress to and egress from said premises aforesaid.

WHEREFORE by reason of the premises plaintiff demands judgment and decree, [13]

First: That this Court decree that an emergency exists in this case and that a preliminary injunction be issued herein enjoining and restraining said defendants and each of them, their servants, agents, and employees and all persons acting by, through, or under them from placing in any of the waters of the Columbia River in front of or adjacent to said Sites No. 2 and 3 on said Sand Island, or from maintaining in front of said premises in said waters any obstruction whatever, particularly the obstructions now there *maintain* as hereinbefore mentioned, and from any interference with the free and uninterrupted ingress to and egress from said premises.

Second: That upon the final hearing herein the injunction be made perpetual, and that all obstructions placed in said waters in front of said premises

be abated and the defendants be required to remove the same, and upon their failure to do so that plaintiff be entitled to do so at the cost and expense of said defendants.

Third: That plaintiff have such other and further judgment and decree in the premises as to this Honorable Court may seem equitable and just.

G. C. FULTON,  
Attorney for Plaintiff.

State of Oregon,  
County of Clatsop,—ss.

I, Samuel Elmore, being first duly sworn, depose and say that I am vice-president and general manager of plaintiff in the above-entitled action; and that the foregoing Amended Complaint is true, as I verily believe.

SAMUEL ELMORE. [14]

Subscribed and sworn to before me this first day of August, 1908.

[Notarial Seal] G. C. FULTON,  
Notary Public for Oregon.

My commission expires Dec. 28, 1909.

State of Washington,  
County of Pacific,—ss.

Due service of the within Amended Complaint is hereby accepted in said county and State, this 5th day of August, 1908, together with a copy thereof.

WELSH, WELSH & O'PHELAN,  
Attorneys for Defendants.

[Endorsed]: Amended Complaint. Filed U. S. District Court, Western District of Washington.

Aug. 11, 1908. A. Reeves Ayres, Clerk. ———, Deputy. [15]

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*In the Circuit Court of the United States for the  
Western District of Washington, Western Di-  
vision.*

COLUMBIA RIVER PACKERS' ASSOCIA-  
TION,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and L. N.  
STENSLAND,

Defendants.

**Bond for \$2,000.00 for Injunction.**

The above-named plaintiff having instituted a suit in the above-entitled court asking for a preliminary injunction enjoining and restraining the above-named defendants from the doing of certain acts and things in the complaint mentioned, and the said Court being advised that an emergency exists and has granted said restraining order and has fixed the bonds therefor at the sum of \$2,000.00;

NOW, THEREFORE, we, Columbia River Packers' Association, as principal, and The United States Fidelity & Guaranty Company as surety, hereby undertake that the above-named plaintiff will pay all damages and costs which may accrue by reason of the injunction or restraining order, not exceeding, however, said sum of \$2,000.00.

IN WITNESS WHEREOF, we have hereunto set  
our hands and seals this 7th day of July, 1908.

COLUMBIA RIVER PACKERS' ASSO-  
CIATION,

By SAMUEL ELMORE,  
Vice-president.

THE UNITED STATES FIDELITY AND  
GUARANTY CO.,

[Seal of Surety Co.] By DOUGLAS R. TATE,  
Its Attorney in Fact.

[Endorsed]: Filed & Approved July 7, 1908. A.  
Reeves Ayres, Clerk. By Saml. D. Bridges, Deputy.  
[16]

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*In the Circuit Court of the United States for the  
Western District of Washington, Western Di-  
vision.*

COLUMBIA RIVER PACKERS' ASSOCIA-  
TION (a Corporation),

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and L. N.  
STENSLAND,

Defendants.

**Bond for \$10,000.00 for Injunction.**

WHEREAS the above-named plaintiff has insti-  
tuted an action in the above-entitled court against  
the above-named defendants praying, among other  
things, for an injunction and restraining order *pen-*



*dente lite*; and said injunction having been heretofore issued upon an order requiring the said defendants to appear before the above-entitled court at the court-rooms thereof at Seattle, King County, Washington, on Monday, July 20, 1908, at 10 o'clock A. M. and show cause why such preliminary injunction should not continue in force. And said parties having appeared before said court at said time and such proceedings were then and there had that the said hearing was continued until the first Monday in September, to wit, Monday, September 7, 1908, at the court-rooms of the above-entitled court; and said preliminary injunction was by order of the Court continued in force until said date and until the further order of the Court, and the plaintiff was required to give another bond in the sum of \$10,000.00 for a continuation of such injunction;

NOW THEREFORE we, Columbia River Packers' Association, a corporation, plaintiff, and United States Fidelity and Guaranty Company, as surety, hereby undertake that the above-named plaintiff [17] will pay all damages and costs which may accrue to the defendants by reason of said injunction or restraining order, not exceeding however the sum of \$10,000.00.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 21st day of July, 1908.

[Seal of Columbia River Packers' Assn.]

COLUMBIA RIVER PACKERS' ASSO-  
CIATION,

By S. ELMORE, [Seal]

Vice-president.

[Seal of Surety Company]

THE UNITED STATES FIDELITY AND  
GUARANTY CO.,

DOUGLAS R. TATE, [Seal]

Attorney in Fact.

[Endorsed]: Filed July 24th, 1908. A. Reeves  
Ayres, Clerk. [18]

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*In the Circuit Court of the United States for the  
Western District of Washington, Western Di-  
vision.*

COLUMBIA RIVER PACKERS' ASSOCIA-  
TION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and L. N.  
STENSLAND,

Defendants.

**Restraining Order.**

Now on this day came on to be heard the above-entitled cause before the above-entitled court on the application of the plaintiff for a preliminary injunction. And the Court, on reading the bill of complaint filed by the complainant herein, and on motion of G. C. Fulton, Esq., its solicitor.

IT IS ORDERED BY THE COURT that this cause be and the same is hereby set for hearing before this Court at Seattle, King County, Washington, on the 20th day of July, A. D. 1908, at ten o'clock A. M. at the courtroom in the above-entitled court;

and the said defendants are hereby required to then and there appear to show cause, if any, why an injunction should not be issued enjoining and restraining said defendants from the doing of the acts and things complained of in complainant's complaint;

On the application of said complainant for an injunction *pendente lite*, it appearing to the Court that an emergency exists, and that the complainant is entitled to such injunction, and the said complainant having filed herein its bond with sufficient surety approved by the clerk, in the sum of Two Thousand Dollars (\$2,000);

IT IS FURTHER ORDERED BY THE COURT that the said defendants and each of them, and all persons acting by, through or under them, their servants, agents and employees, are hereby [19] enjoined and restrained until the further order of the Court in the premises, from in any manner interfering with the free ingress to and egress from, and from placing or maintaining any obstruction or anchor or killock, or any timber, log or appliance whatever, that will interfere with the use of a seine floating upon and navigating the waters of the Columbia River in front of or adjacent to Sites Numbered Two (2) and Three (3) on Sand Island in the County of Pacific in the State of Washington, the shore line of said Sites numbered (2) and Three (3) being described as follows:

Beginning at a point 4000 feet easterly along low-water line from a point on low-water line due west of United States Monument No. 4 erected on Sand Island by the United States Government Survey;

thence easterly along the said shore line to east boundary line of Site No. 4 on said Sand Island, said point being a point on said low-water line that will intersect a north and south line 781 feet east of United States Monument No. 6 on said Sand Island. That Sand Island referred to herein is the island that is generally known and recognized on all official records, maps and plats as *San* Island, and is an island located on the Columbia River opposite the town of Ilwaco between the County of Pacific in the State of Washington and the County of Clatsop, in the State of Oregon, and on the north shore of the main channel of the Columbia River.

Dated July 7th, 1908.

C. H. HANFORD,  
Judge.

#### RETURN ON SERVICE OF WRIT.

United States of America,  
Western District of Washington,—ss.

I hereby certify and return that I served the annexed restraining order on the therein named H. S. McGowan, J. P. Coyle, and Erick Lindstrom at McGowan, Wash.; and Walter Bussey and L. N. Stensland, whose true name is I. N. Stensland, at Chinook, Washington, by handing to and leaving a true and correct copy thereof with H. S. McGowan, Erick Lindstrom & J. P. Coyle at McGowan, [20] Wn.; and Walter Bussey and I. N. Stensland personally at



Chinook, Washington, in said District on the eighth day of July, A. D. 1908.

C. B. HOPKINS,  
U. S. Marshal.  
By J. F. Statter,  
Deputy.

Dated at Tacoma, Washington, on this 9th day of July, A. D. 1908.

Marshal's fees, \$10.00.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Jul. 7, 1908. A. Reeves Ayres, Clerk. ———, Deputy. [21]

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*In the Circuit Court of the United States for the  
Western District of Washington, Western Di-  
vision.*

COLUMBIA RIVER PACKERS' ASSOCIA-  
TION,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and L. N.  
STENSLAND,

Defendants.

**Answer of Defendant, H. S. McGowan, in Equity.**

The defendant, H. S. McGowan, now and at all times hereinafter saving to himself all and all manner of benefit of exception or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections, in the plaintiff's said

amended bill of complaint, in the above-entitled action contained, for answer thereto says, admits, alleges and denies as follows:

1.

This defendant admits that plaintiff is now and was at all the times mentioned in its amended complaint, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and that it was and is a citizen of said State and that its office and place of business is in Astoria in said State; and this defendant admits that plaintiff is now and was at all of the times mentioned in plaintiff's amended complaint authorized and empowered by its articles of incorporation, to own, possess and *acquit*, real estate and personal property.

This defendant denies that plaintiff is now and was at all of the times in its amended complaint mentioned or that it is now or that it ever was authorized and empowered or authorized or empowered by its articles of incorporation or otherwise to [22] engage in the business of taking and catching or of taking or catching and dealing generally or otherwise in salmon and other fish or in salmon or in other fish, for trade and profit or for trade or profit. This defendant denies that plaintiff is or was at any time whatever or at all authorized and empowered by its articles of incorporation or that it ever was authorized or empowered by its articles of incorporation to engage in the business of operating of all kinds of fishing appliances or of any kind of fishing appliances in the Columbia River and the waters

thereof or in the Columbia River or the waters thereof.

2.

This defendant admits that on or about the 9th of July, 1906, plaintiff caused to be filed and recorded in the office of the Secretary of State of the State of Washington, a certified copy of its articles of incorporation, duly certified to by the Secretary of State of the State of Oregon; and that plaintiff also filed in said office of the Secretary of State of the State of Washington, a writing signed by the vice-president of plaintiff, and attested by the plaintiff corporation seal, wherein and whereby said plaintiff therein constituted and appointed R. A. Hawkins, of Pacific County, Washington, its agent to accept service of process in any action or suit brought by or against plaintiff, within the State of Washington, or in which plaintiff should be a party in said State; and that said writing contained the name of said agent, namely, R. A. Hawkins, together with his place of residence, as Ilwaco, Pacific County, State of Washington; but this defendant denies that plaintiff was or is authorized, at any time whatever or at all, by the laws of the State of Washington or otherwise, to perform every act and transact or to perform any act or transact any kind of business within the State [23] *Washington*, in the same manner and in the same extent or in the same manner or to the same extent as corporations incorporated and organized under the laws of said State of Washington, are authorized to do by the laws of said State.

That as to whether a majority of the capital stock

of plaintiff is owned by citizens of the United States, this defendant has not sufficient knowledge or information on which to base a belief and therefore denies the same.

## 3.

Defendant admits paragraph number three of plaintiff's amended complaint.

## 4.

This defendant denies that prior to the institution of the above-entitled action or at any other time whatever or at all, that the United States of America was and is or that the United States of America was or is the owner in fee or otherwise or at all of that certain tract of land, situated within the County of Pacific, and the State of Washington, the same being an island in the Columbia River, in said Pacific County, Washington, and which is generally named and known as Sand Island; and this defendant denies that the United States of America at any time or at all ever owned Sand Island or any part thereof whatever or at all; and this defendant denies that at the time of this action or at any other time whatever or at all, that the United States of America owned, or that the United States of America is the owner of said Sand Island or any part thereof, or of all or of any of the tide lands or all or any of the water rights or all or any of the privileges or any easements, surrounding or adjacent thereto, and surrounding and adjacent thereto and bordering thereon. [24]

This defendant denies that the United States of America was at the time of the commencement of



the above-entitled action or at any other time whatever or at all, or that it is the owner of any tide land water rights or privileges, or easement surrounding or adjacent to Sand Island defendant alleges is an island in the Columbia River situated in Pacific County, Washington.

This defendant admits that Sand Island is an island in the Columbia River, in Pacific County, Washington, and is known as and described as Sand Island.

This defendant denies that said Sand Island was, by proclamation by the President of the United States, duly issued and published on the 29th of August, 1863, or at any other time whatever or at all reserved from sale, for military purposes or for any other purpose or for military reservations, or for any other reservation; and denies that the same has ever since the 29th of August, 1863, been held and reserved for military and for military purposes, and for military reservations; and denies that the same has ever been held and reserved by the United States at any time whatever or at all, for military purposes and for military reservations or for military purposes or for military reservations or for any other purposes whatever or at all.

This defendant denies that the Secretary of War, from the first day of May, 1908, or at any other time whatever or at all, leased to the plaintiff any tide lands, water rights, fishing rights, in the Columbia River, or in the Columbia River; that defendant denies that pursuant to an act of Congress, approved July 23, 1892, granting authority to the Secretary

of War in his discretion to lease for a period of not to exceed [25] five years, such property in the United States under his control, as should not be required for public use; and denies that the Secretary of War of the United States on the first day of May, 1908, or at any other time leased to the plaintiff, any tide lands, water rights, fishing rights, or any riparian rights adjacent to Sand Island or to the navigable channel of the said Columbia River. Defendant denies that the Secretary of War of the United States, on the first day of May, 1908, or at any other time, leased to plaintiff, for a valuable consideration, or at all the following portions of Sand Island, to wit: Sites numbered Two and Three, for the term of three years or for any other time, together with the tide lands or any lands, or water rights, or fishing rights, or riparian rights adjacent to said Sand Island; and denies that the Secretary of War at any time whatever or at all leased to plaintiff tide lands or water rights, or fishing rights, or riparian rights adjacent to Sand Island or any part thereof.

And this defendant denies that the Secretary of War, on the first day of May, 1908, or at any other time whatever or at all leased all or any of the frontage or tide lands or any of the riparian rights or any water rights or any privilege whatever or at all of said Sand Island to plaintiff.

Defendant denies that the Secretary of War of the United States leased to the plaintiff on May first, 1908, or at any other time, or at all, any portion of said Sand Island, comprising any frontage or any tide lands, or any riparian rights, or any water

rights, south from high lands, north of the line drawn on the line of low-water mark on the Columbia River, on the south side of said island, beginning at a point 4000 feet east along low-water mark due west of the United States Monument Number [26] Four on Sand Island, and thence east along the said shore line to the east boundary line from Monument Number 4 on said Sand Island. Said point being a point on said low-water line that would intersect the north and south line 781 feet distant, east of the United States Monument Number Six, erected on Sand Island, by the United States Government surveyor; and denies that the Secretary of War ever leased to plaintiff at any time whatever or at all, any frontage, tide lands, or tide lands, or riparian rights, or *or* any water rights or any privileges whatever on said Sand Island or that the Secretary of War leased any of the frontage or any of the tide lands or any riparian rights or any water rights, fronting or abutting or adjacent to or in the waters surrounding said Sand Island.

Defendant further denies that the plaintiff ever leased from the United States Government, or from the Secretary of War of the United States, any tide lands or riparian rights or any rights or privileges whatever in the waters of the Columbia River in or surrounding said Sand Island, excepting that defendant admits that Sand Island is an island situated within the said Columbia River, in Pacific County, Washington; and that the Secretary of War of the United States did, on or about the first day of May, 1908, purport to lease to plaintiff Site Number 2 and



Site Number 3; and that said Site Number 2 and the boundaries thereof are described as follows: The west boundary corresponds with the east boundary of Site Number One, and the east boundary is marked by a line due south from the United States Monument Number 5, to low water; and that the boundaries of Site Number One are as follows, to wit: The north boundary is marked by a line drawn due west from the United States Monument Number Four, to the intersection of the low-water line, the east [27] boundary is marked by a line due south from the point 1314.5, due west of the United States Monument Number Four, to the intersection with low-water line; and that Site Number Three is described as follows, to wit: The west boundary corresponds with the east boundary of Site Number Two, and the east boundary is marked by a line due south to low water, from a point 781 feet due east of the United States Monument Number Six.

And this is the pretended lease which plaintiff alleges in its amended complaint; and this defendant denies that the Secretary of War of the United States ever at any time whatever or at all ever leased or pretended to lease to plaintiff any fishing rights in the waters surrounding said Sand Island in the Pacific County, State of Washington.

This defendant further answering says and avers: That neither the Secretary of War of the United States nor the United States has any power and never did have any power or authority whatever to lease to plaintiff or to any other person any riparian or fishing rights, nor the right to fish for salmon



fish in the waters of the Columbia River within Pacific County, Washington; and that the Sand Island which is mentioned and described in plaintiff's amended complaint is not the Sand Island which the President of the United States by proclamation duly issued and published on the 29th day of August, 1863, reserved from sale for military purposes and for military reservations or for military reservations; and this defendant is informed and believes and on his best information and belief alleges and says: That the Sand Island which the President of the United States, by proclamation, duly issued and published on the 29th day of August, 1863, reserved from sale for military purposes, and for military reservations, did long prior to the commencement of [28] this action, and prior to January first, 1908, became submerged with the water of the Columbia River and it ceased to exist prior to January the first, 1908, and at no time since has existed.

Defendant denies that upon the execution and delivery of said purported lease or of any lease, that plaintiff immediately entered into the possession of said premises, or of any part thereof, or that plaintiff immediately after the first of May, 1908, entered into the possession of said premises or any part thereof, excepting that defendant admits that on the 2d and 3d day of July, 1908, and since said time plaintiff did go upon said Sand Island and did unlawfully trespass upon and unlawfully fish for salmon fish on the locations of this defendant set nets hereinafter described.

Defendant denies that said Sites Number Two

and Three as aforesaid, and mentioned in plaintiff's amended complaint, are on the south side of said Sand Island, or that either of them is on the south side of said Sand Island; and denies that said Sites Number Two and Three or any or either of them are on the north shore of said main ship channel, but defendant admits that said sites are on the said Sand Island and that said Sand Island is on the north shore of said main ships' channel on the Columbia River.

Defendant admits that said Sand Island and said sites are within the jurisdiction of this Court and are within the Western District and Western Division thereof; and that the water of the Columbia River washes said shore of said Sand Island; and defendant denies that said waters which are in close proximity to said Sand Island, are navigated by the ocean-going or any of the ocean-going vessels or any vessel whatever or at all; and defendant denies that all the vessels that carry or [29] that any vessel that carries the commerce of said States of Washington and Oregon, or either of said States, navigate said waters, excepting that said defendant does admit that the Columbia River is a navigable stream; and that vessels which carry the commerce of Washington and Oregon navigate in the main ships' channel of said Columbia River; and defendant admits that said Sand Island, which is now situated within the Columbia River, and within Pacific County, Washington, is surrounded on the south side of Sand Island by the waters of the Columbia River; defendant denies that said Sites Number Two and

Three or any of them, extend beyond the line of low water in said Columbia River.

Defendant denies that Sand Island or said Sites Number Two and Three or either of them have any riparian rights or that the lessors or any person claiming title thereto have any riparian rights beyond the line of ordinary high tide in the waters of the said river.

That as to whether or not said Sand Island contains any mineral or phosphate, of any kind, this defendant does not have any knowledge or information, sufficient to form a belief and therefore denies that said Sand Island does not contain any mineral or phosphate.

Defendant denies that said premises of said Sand Island or said Sites Number Two and Three or any or either of them are or at any time have been of great value or of any value whatever or at all for the right of fisheries thereon.

This defendant denies that said premises or any or either of them, that is, said Sand Island or said Sites Number Two and Three or either of them were leased to plaintiff by the said United States or the Secretary of War for the sole purpose [30] of being used and employed as a fishery or for the purpose of being used as a fishery or for the sole purpose of operating seines or any seines for catching salmon fish from the shore, and the waters of said river, and landing the same on the shore; and this defendant denies that said Secretary of War of the United States or the United States, or any or either of them, had any right to lease to plaintiff or to any

other person the waters of said river or any part thereof for the purpose of catching salmon fish or for the purpose of operating seines for the purpose of catching salmon fish in the waters of said river; and denies that the Secretary of War had any right or authority to lease to plaintiff said Sand Island or any part thereof for the purpose of fishing in the waters of said Columbia River; and denies that United States or the Secretary of War thereof leased to plaintiff said Sites Number Two and Three for the purpose of authorizing plaintiff to fish in the waters of said Columbia River.

And this defendant says and avers that the Secretary of War of the United States has no authority and is not and was not authorized to lease to plaintiff the right to fish in the waters of the Columbia River, within Pacific County, Washington; and had no authority to lease to plaintiff or to give to plaintiff the right to fish for salmon fish in the waters of the Columbia River, within Pacific County, Washington.

This defendant denies that under the laws of the United States or otherwise, the said waters are required to be kept free from obstruction; and denies that by virtue of said laws, and said lease, as aforesaid, or either of them, plaintiff is entitled of right to have said waters on said channel of said river free and unobstructed; or that plaintiff is entitled [31] to have said waters free and unobstructed; and denies that plaintiff is entitled of right or at all to the free and unobstructed ingress to and egress



from said premises; and denies that plaintiff has any right of ingress to and egress from said premises; and denies that plaintiff is entitled of right to the exclusive right of operating seines for the purpose of catching salmon fish in the waters of said river and landing the same on said shore; and defendant denies that plaintiff is entitled to the exclusive right of catching salmon fish in the waters of said river in front of Sites Number Two and Three or in front of any or either of them; and denies that plaintiff has any right whatever of catching salmon fish in the waters of said Columbia River beyond low tide, and in front of said Sites Number Two and Three.

Defendant denies that plaintiff on the 30th of June, 1908, or at any other time applied to the Fish Commissioner of the State of Washington for a license to operate three seines or any seine upon said Sites Number Two and Three or any or either of them. But this defendant admits that on or about the 30th of June, 1908, plaintiff paid to the Fish Commissioner a license fee exacted by the Fish Commissioner of the State of Washington for licenses number 2391, 2392 and 2393; and that thereupon said Fish Commissioner issued to plaintiff three licenses to operate seines in the Columbia River, numbered respectively, 2391, 2392, and 2393; and defendant denies that thereupon plaintiff was entitled to operate three seines or any seine in the waters of the Columbia River within the State of Washington, for a period of one year thereafter, or at any time or at all and defendant denies that plaintiff was entitled to operate said three seines or any seine or any seine

for the purpose of catching [32] salmon fish in the waters of the Columbia River in front of said Sites Number Two and Three, and below low water, in the waters of the Columbia River, in front of said sites; and defendant denies that plaintiff was at any time or is now entitled to operate any seine for the purpose of catching salmon fish below low water in the Columbia River, in the State of Washington, in front of said Sites Number Two and Three or either of them beyond low water.

This defendant denies that on the 2 of July, 1908, or at any other time or at all that the plaintiff was entitled to operate three seines or any seine whatever in front of said Sites Number Two and Three beyond the line of low tide in the waters of the Columbia River and denies that plaintiff was entitled at said time or at any other time whatever or at all, or that plaintiff is now entitled to operate any seine in front of said Sites Number Two and Three or any or either of them in the waters and channel or in the waters or channel of said Columbia River.

Defendant denies that this defendant or that any of the defendants in the above-entitled action wrongfully and unlawfully or wrongfully or unlawfully or in violation of plaintiff's rights or in violation of the laws of the United States, or in violation of any law, placed in the channel of said navigable water of said Columbia River, in front of plaintiff's leased premises or in front of any leased premises of plaintiff or in front of Sites Number Two and Three as aforesaid, certain obstructions; or that defendants or any of them placed any obstruction in or to the naviga-

tion of said waters or in said waters; and denies that defendants or either of them have placed any obstruction whatever in the channel of said [33] navigable waters of the Columbia River or in the waters of said Columbia River; and denies that plaintiff had any right on July 2, 1908, or at any other time, or that plaintiff now has any right to operate its said seines or any seine under its licenses or otherwise or at all in front of said Sites Number Two and Three, below the line of low tide in the waters of the Columbia River within Pacific County, Washington;

Defendant denies that this defendant or that any of the *of the* defendants on July 2, 1908, or at any other time whatever or at all have placed or maintained any obstruction to the navigation of said waters, consisting of large stones or of any other thing, whatever or at all; and denies that this defendant or that any of the defendants at any time whatever or at all have placed any obstruction in the waters of the Columbia River in front of said Sites Number Two and Three or at any other place whatever in said Columbia River. And denies that this defendant or any of the defendants at any time whatever or at all, have placed any obstructions of any character whatever in the waters of said Columbia River at any place in said water whatever; and denies that this defendant or that any of the defendants in any manner whatever or at all have prevented plaintiff from operating a seine on said Sites Number Two and Three; and denies that this defendant or that any or either of the defendants have excluded



the public generally, or the plaintiff or any other person from operating either gill nets, drift nets or seines or any or either of them in the waters of said Columbia River, excepting that defendant admits that on the 2 of July, 1908, he was the owner of and engaged in the operation of two set nets in the waters of the Columbia River in Pacific County, Washington, on the [34] south side of said Sand Island, and that said set nets and each of them were operated by him for the purpose of catching salmon fish under licenses issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908, and that the number of said licenses owned by him, and under which said set nets were operated are numbers 1431 and 1432; and that the same were duly issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908; and that this defendant paid to the Fish Commissioner of the State of Washington the fee exacted and required by law for said fishing appliances and that said set net number 1431 was situated in the waters of the Columbia River at a point about 200 feet in an easterly direction from what is known as and called "Great Republic Wreck" in front of said Sand Island, in Pacific County, Washington, and number 1432 was about 700 feet easterly from said point; and that each of said set nets were situated in front of Sand Island, beyond the line of ordinary low tide, and also beyond the line of extreme low tide; and between the point of extreme low tide and the adjacent channel of said Columbia River, and that said set nets and each of them were located by a stone anchor,



weighing about 300 pounds, to which was attached a 7/16 inch chain about five feet long, which was clamped to a wire rope about 25 feet long, to which was attached a cedar buoy about 4 feet long and 8 inches square and upon which buoy was securely fastened the license number of each location; and that said nets were operated on the 2d day of July, under the license number 1431 and 1432, and said licenses were issued by the Fish Commissioner on the 15th of April, 1908, in consideration of the payment of the lawful amount required by law for a fish license for each set net, to wit: The sum of \$2.50, and each of said licenses bore and [35] bears the number and contains the name of the person to whom said licenses and each of them was granted.

This defendant further avers and also admits that under and pursuant to said license and the laws of the State of Washington, this defendant did, on or about the 16th of June, 1908, cause the location for said set nets and each of them to *to* be made by securely anchoring a buoy on each location as herein described, upon each of which buoys he posted and caused to be posted the number of said license under which *under which* said set net was operated; and said set nets nor neither of them, did not occupy more than one-third of the width of said Columbia River; that at the same place and location where affiant was fishing and operating his said set nets under licenses number 1431 and 1432, his predecessors in interest fished and operated said locations, for the purpose of catching salmon fish with fishing appliances authorized by the laws of the State of Washington, under licenses duly issued by

the Fish Commissioner of the State of Washington, for the year 1902, and during the fishing seasons of each and every year since said year up to and including the year 1907.

That this defendant was fishing and operating his said set nets under licenses numbered 1431 and 1432 as aforesaid, at the time that he was enjoined by order of this Court in this action or proceeding.

That defendant had located and was operating, occupying and fishing said locations with his said set nets, long prior to the time that the plaintiff commenced fishing on said locations, and grounds, with its said drag seines, as alleged in plaintiff's amended complaint, for that plaintiff did not commence fishing on said grounds and locations until on or about the 3d of July, [36] 1908.

Defendant further answering avers and says: That under the laws of the State of Washington, defendant is entitled to and has the sole, prior and exclusive right to the location now occupied by defendant's said set nets, and is entitled to the sole, prior and exclusive right to fish on said locations for salmon fish; and this defendant was fishing for salmon fish on said locations and had selected and located said locations long prior to the time that plaintiff commenced to fish; and that defendant was operating his said set nets for the purpose of catching salmon fish on said locations, at the time that this Court enjoined him; and that this defendant is entitled to the lateral passageway of at least 300 feet and an end passageway of at least 30 feet, between his said set nets, and each of them and all other fishing appliances.

Defendant further says and avers: That defendant was until enjoined by the order of this Court, operating his said set nets, in the usual way and in the only manner in which they can be fished and operated, and in no way and in no manner interfering with the property leased by plaintiff, even if the Court should find that plaintiff had a lease to said property; and said set nets are fished and operated solely and entirely from boats plying upon the waters of the said Columbia River, at a point beyond extreme low tide; and in so fishing said set nets, neither the defendants nor said set nets trespassed upon any lands or shore lines leased by plaintiff.

Defendant further avers: That his said set nets as located and fished by him did not and will not obstruct or interfere with navigation in said river, for the purpose of trade or commerce, or for any other purpose for that said set nets were so constructed [37] and will be so constructed that they will not extend to the adjacent channel of said river, and the water at the present location of said set nets is not to exceed six feet in depth at low tide.

Defendant further avers; that he located his said set net locations and commenced fishing the same long prior to the time and before plaintiff obtained any license from the Fish Commissioner of the State of Washington to fish or operate any drag seines, and prior to the time that plaintiff obtained licenses number 2391, 2392 and 2393, as alleged in its amended complaint, this defendant had located and was fishing and operating for the purpose of catching salmon fish with appliances authorized by the laws of the



State of Washington, and under defendant's said licenses issued to him as aforesaid, by the Fish Commissioner of the State of Washington; and that the place where this defendant was operating and fishing its said set nets was and is in the Columbia River, in Pacific County, Washington, and in that part of said Columbia River, which is described as follows, to wit:

At a point in the Columbia River, in Pacific County, Washington, which is about 200 feet and 700 feet respectively in an easterly direction from the place known and commonly called "Great Republic Wreck" in front of Sand Island, in the Columbia River, beyond the line of ordinary low tide, and also extreme low tide, and beyond the line of extreme low water in said river and between said point of extreme low water and the adjacent channel of said river; and the said set nets and each of them was situated in said Columbia River and in front of, but beyond, said Sand Island, and the same were fished and operated by this defendant, at said place, prior to the time that plaintiff obtained [38] any licenses from the Fish Commissioner of the State of Washington, to fish; and prior to the time that plaintiff commenced to fish at said place. And that these set nets of the defendant's are what the plaintiff in its complaint alleges to be obstructions; and this defendant admits that he fished and operated and was fishing and operating said set nets at the place hereinabove described prior to the first of July, 1908. And that he continued to fish and operate the same, for the purpose of catching salmon fish, until he was



enjoined by the order of this Court in this action.

This defendant admits that plaintiff did on the 2 of July, 1908, attempt to remove, take up and destroy, defendant's said set nets; and that plaintiff kept on doing so, and kept on in its attempt at removing and destroying defendant's set nets and defendant's locations, until finally plaintiff came into this court, and in its complaint alleges that the defendant's set nets constituted and were obstructions, to the navigation of said Columbia River, and obtained from this Court an injunction prohibiting this defendant from fishing and operating his said set nets. But this defendant denies that on the 2 of July, 1908, or at any other time whatever or at all, at great labor or expense or time, or otherwise or at all, that plaintiff removed any obstructions from the Columbia River in front of said Sites 2 and 3 and defendant denies that there were any obstructions in front of said sites and in said river until the plaintiff obstructed same and came there and unlawfully attempted to secure the exclusive right to fish in said Columbia River, and thus obstructed the navigation of said river.

Defendant denies that on the 4 of July, 1908, or at any other time, that defendant wrongfully and unlawfully and in [39] violation of the laws of the United States, placed any obstructions in front of said premises; and defendant denies that he ever placed any obstruction at any time, whatever, or at all of any character, in said Columbia River, or in front of said premises. But defendant admits and he also avers as follows:

That he fished and operated his said set nets for the purpose of catching salmon fish under licenses issued by the Fish Commissioner of the State of Washington, and numbered 1431 and 1432, and which said licenses were issued to defendant on April 15, 1908; and being the same licenses hereinabove described by defendant. And that number 1431 was situated at a point about 200 feet in an easterly direction from what is known and called "Great Republic Wreck" in front of Sand Island, in the Columbia River, in Pacific County, Washington. And that number 1432 was situated about 700 feet easterly from said point.

This defendant alleges that each of said set nets were situated in front of said Sand Island, beyond the line of ordinary low tide and also beyond the line of extreme low tide and between the point of extreme low tide and the adjacent channel of said river; and the same were located by a stone anchor, weighing about 300 pounds, to which was attached a piece of 7/16 inch chain, about five feet long, which was clamped to the wire rope about 25 feet long to which was attached a cedar buoy about four feet long and eight inches square, and upon which said buoy was securely fastened the license number of each said location.

And this defendant admits and also avers as follows: That he was operating said set nets under said licenses for the purpose of catching salmon fish in the waters of the Columbia River, in Pacific County, Washington, at the place hereinabove stated by defendant; and that he continued to operate and fish [40] said set nets under said licenses for the

purpose of catching salmon fish until he was enjoined from so doing by this Court in this action.

And this defendant alleges that these set nets are what the plaintiff in its complaint pretend and charge to be obstructions. But this defendant denies that the same were placed from the shore of said Sites 2 and 3 for that this defendant alleges that the same were placed, that is, that said set nets were situated in the waters of said Columbia River, in front of said Sand Island, beyond the line of ordinary low tide and also beyond the line of extreme low tide and between the point of extreme low tide and the adjacent channel of said river, and that the same were not upon said Sites Number Two and Three or any part thereof; and that this defendant alleges that he had and still has a prior right to fish for fish in the waters of said Columbia River, under said licenses; and that the plaintiff does not have any right to fish in the waters of said Columbia River, at the places where said set nets were located without leaving for this defendant's said set nets the end and also the lateral passageway required by the laws of the State of Washington.

This defendant denies that said set nets constituted any obstructions to the waters of said navigable river; and denies that they were so placed as to prevent the free ingress to said Sand Island, or any part thereof; and denies that said set nets were so placed as to prevent free egress from said Sand Island, or any part thereof; and denies that they were so placed as to interfere with or prevent free access to said Sand Island, or any part thereof.

And this defendant denies that said set nets or



either of them constitute any obstruction whatever to the navigable [41] waters of said Columbia River; and denies that said set nets or any or either of them was or are so placed in said Columbia River as to prevent ingress to said Sand Island, or said Sites Number Two and Three or any part thereof; and denies that said set nets were or are so placed in said Columbia River, as to prevent egress from said Sand Island, or said Site Number Two and Three or any part thereof.

This defendant denies that he had or placed any obstruction in said Columbia River at any place whatever in said river, and denies that he ever at any time or place whatever placed or caused to be placed any obstructions, or obstruction whatever, in said Columbia River or in front of Sites Two or Three or in front of Sand Island or any part thereof.

This defendant denies that this defendant or the defendants or either of them threaten to and will unless restrained by this Court, continue to place any obstructions in said waters in front of said premises; and denies that this defendant or any of said defendants will, unless restrained by this Court, place any obstruction whatever in said waters; and denies that this defendant or any of said defendants threaten to or that any of them will use or employ or that any of them will use and employ any obstruction in said waters of said river, excepting that this defendant admits that unless restrained by the order of this Court, that he will continue to fish for salmon fish, during the fishing seasons of the year 1908 and future years, and operate said two set nets, in the waters of



said Columbia River in front of said Sand Island at the place in said waters where the same were at the time of the commencement of this action, as herein in this answer alleged.

But this defendant denies that said set nets or any or either of them, or any part thereof is an obstruction to navigation; or that the same will be an obstruction to navigation in the waters of said Columbia River. [42]

This defendant denies that his said two fishing nets are of no practical use; and denies that they are of no use, but on the contrary avers and says: That the same are of much value and of much profit to this defendant, for the purpose of catching salmon fish, for that salmon fish are of much value and if defendant is permitted to operate the same, he will catch many valuable salmon fish therein.

This defendant denies that said fishing nets are placed or used in the waters of said Columbia River for the purpose of annoying plaintiff or that the same are placed in the waters of the Columbia River for the purpose of preventing plaintiff from operating its seines or for the purpose of interfering with or obstructing free ingress to and the free egress from said Sand Island. But on the contrary, this defendant alleges, says and avers: That this defendant has a prior right to fish for salmon fish his said two set nets in the waters of the Columbia River, in Pacific County, Washington, at the place where the same were at the time of the commencement of this action, and that plaintiff has no right to operate its seines upon or over the locations of defendants said two set

nets, or any or either of them; and this defendant denies that his set nets were not placed in said waters in good faith; and denies that any or either of them is an obstruction to the navigation of said river.

Defendant denies that he has obstructed or that he intends to obstruct the navigation of said Columbia River, in any manner whatever or at all; and denies that he ever placed any obstruction in the waters of said Columbia River; and denies that he intends to place any obstruction whatever in the waters of the Columbia River; defendant admits that he will, unless restrained by the order of this Court, continue to fish and operate [43] for the purpose of catching salmon fish, his two said set nets, under said licenses as aforesaid, during the fishing seasons of the year 1908 and future years. But this defendant denies that said set nets or any or either of them or any part of any or either of them is an obstruction or constitutes an obstruction, or interfered with the ingress to and the egress from said Sand Island or any part thereof.

That as to whether or not the plaintiff has expended, for the purchase of seines or appliances necessary to conduct seining operations on said premises and shores, \$15,000.00, this defendant has not sufficient knowledge or information on which to base a belief and therefore denies the same.

That as to whether or not plaintiff has employed and now has in its employ and had in its employ at the time of the commencement of this action thirty-four men, this defendant does not have any knowledge or information on which to base a belief, and

therefore denies the same, excepting that defendant admits that plaintiff has employed a large number of men.

But this defendant denies that plaintiff has any right to conduct any seining operations in front of said Sites Two and Three in the waters of the Columbia River, beyond the line of low tide or low water in said river.

This defendant denies that it is necessary for plaintiff to use, keep or care for twenty-four horses or any number of horses in operating said seining ground; and denies that plaintiff has any right to fish for salmon fish with seines in the waters of said Columbia River beyond the line of low water in said Columbia River, in front of said Sand Island, or in front of said Sites Number Two and Three.

This defendant denies that plaintiff is required to [44] pay a rental for said premises in the sum of \$5,175.00 per annum or any other sum whatever or at all, excepting that this defendant admits that the Secretary of War of the United States, did purport to lease to plaintiff, for an annual rental of \$5,175.00, those certain sites mentioned hereinabove in this answer as Sites Number Two and Three, but this defendant denies that said Site Number Two extends beyond the line of ordinary low water, even if the Secretary of War had the right to lease the same to plaintiff; and this defendant denies that said Site Number Three extends beyond the line of low water, in said Columbia River, even if the Secretary of War of the United States had the right or authority to lease said site to plaintiff; but this defendant denies

that the Secretary of War had any right or authority to lease said sites or any part thereof to the plaintiff.

Defendant admits that the salmon fish in the Columbia River are of great value and ascend the river only at certain intervals during each year, and were at the commencement of this action, and are now in the waters of the said Columbia River, in great numbers.

This defendant denies that defendants or any or either of them ever maintained or ever intend to maintain any obstruction in the waters of the Columbia River, excepting that defendant admits that this defendant intends, unless restrained by the order of this Court, to fish for salmon fish his said two set nets hereinabove in this answer mentioned and alleged.

Defendant denies that unless restrained and enjoined by process of this Court that the alleged damage mentioned in plaintiff's complaint will be committed or that any act of defendant will be a damage to the complainant, or that any action of defendant will produce irreparable damage to the complainant.  
[45]

Defendant denies that any action of defendant prevents plaintiff from the use of said locations numbered two or three or any or either of them or any part thereof; and defendant denies that any action of defendant will prevent the plaintiff from using its seines on said Sites Two or Three or any or either of them; and defendant denies that any action of defendant will damage the complainant to the amount of many thousands of dollars, or to any amount what-



ever, or at all; and denies that complainant will be damaged by the defendant's acts or act in any manner whatever or at all.

Defendant admits that it is impossible to estimate the number of fish that will be caught in the fish net or other appliance, but this defendant denies that complainant has any right whatever to fish for salmon fish with seines, on location of defendant's said set nets or any or either of them.

Defendant denies that if this defendant is permitted to fish his said two set nets that plaintiff will not be able to use said Sites Number Two or Three or to use its seines on said Site Number Two and Three; but this defendant denies that plaintiff has any right whatever to use his said seines or any or either of them in the waters of the Columbia River, for the purpose of catching salmon fish in said waters, or for any other purpose beyond the line of low water in front of Sand Island, and said Sites Two and Three herein mentioned; and defendant denies that plaintiff has any right to use any seines whatever in the waters of the Columbia River, for the purpose of catching salmon fish in front of Site *Number or* Three, or any or either of them, beyond the line of low water; and denies that plaintiff has any right to use its seines for the purpose of catching salmon fish on the location of this defendant's said two set nets, or any or [46] either of them.

This defendant denies that he has trespassed upon any property or any rights or franchises of plaintiff; and denies that he has ever obstructed at any time whatever or at all, or that he will daily or other-

wise, or at all, or at any time, whatever or at all, place any obstruction in the waters of the Columbia River at any place whatever in said river. But this defendant admits that unless restrained from so doing by the order of this Court, that he will daily continue to exercise the exclusive right of fishery in front of Site Number Two and Three in front of said Sand Island, with his said set nets, below the line of low water, in the waters of the Columbia River, for the purpose of catching salmon fish; and this defendant in this connection says and avers: That this defendant has the exclusive right of fishery in front of said premises with his said two set nets at the location of said two set nets; and that he will continue to fish his said two set nets at the locations and at the place where the same were located at the time of the commencement of this action, unless restrained by the order of this Court, for this defendant alleges that the plaintiff has trespassed upon the right of fishery of this defendant.

This defendant denies that he has ever harrassed or annoyed, or that he will continue to harrass or annoy plaintiff, or that he will prevent plaintiff from ingress to or egress from said premises, excepting that this defendant admits that he will unless restrained by the order of this Court, continue to fish for salmon fish in the waters of the Columbia River within Pacific County, Washington, and below the line of low tide, in front of said Site Two and Three of his said two set nets, under license duly issued by the Fish Commissioner of the State of Washington, [47] and at the places where said two set nets were

located at the time of the commencement of this action, as hereinabove in this answer stated, unless restrained by the order of this Court.

This defendant denies that any emergency exists; and denies that plaintiff is entitled to a preliminary injunction, or any injunction at all, enjoining defendants, or either of them, from maintaining any obstruction; and denies that defendants, or any or either of them had or maintained any obstruction whatever in front of said premises or in waters adjacent thereto or in the waters of the Columbia River; and this defendant denies that he ever maintained any obstruction whatever in the waters of the Columbia River, in Pacific County, Washington, or any other place; and this defendant denies that he ever prevented plaintiff's free ingress to and egress from said Sand Island; and denies that he ever prevented or interfered with the operating of plaintiff's said seines on said Site Two and Three, or any or either of them, or any part thereof; and denies that he ever interfered with or that he intends to interfere with plaintiff from using said seines or any or either of them upon said Site Number Two or Three in said Sand Island.

But this defendant admits that he intends to operate his said two set nets for the purpose of catching salmon fish in the waters of the Columbia River, in Pacific County, Washington, in front of Sites Number Two and Three and at the locations at which said set nets were at the time of the commencement of this action, during the fishing season of this year, and future years, unless restrained by the order of



this Court, but said defendant avers and says: That his said set nets were not upon said Site Number Two and Three, or any part thereof, and that neither of said set nets nor any part thereof were [48] upon any part of said Sand Island, for that said set nets were in the waters of the Columbia River, below low tide and below low water, and did not extend out to the channel or to the main ships channel of said Columbia River, in Pacific County, Washington; and this defendant denies that said set nets are or any or either of them or any part thereof was an obstruction to or interfered with the navigation of said Columbia River, or waters thereof; and denies that the same interfered with or prevented ingress to or egress from said Sand Island, or any part thereof.

Defendant avers and says: That his two set nets hereinabove described and mentioned, are the alleged obstructions of which plaintiff in its complaint complains; and this defendant denies that the same were or are, or that the same will be, any obstruction to the navigation to the waters of the Columbia River, or to said waters, or that the same or any or either of them, or any part thereof, were or will be or constitute any obstruction.

Defendant denies that said two set nets were placed in the waters of the Columbia River for the purpose of harrassing or annoying plaintiff; and denies that the same were placed in the waters of the said Columbia River for the purpose of preventing plaintiff from ingress to or egress from said premises; and denies that the same were placed in the waters of the Columbia River for the purpose of preventing plain-



tiff from ingress to or egress from said premises.

That defendant admits that he did not get permission from the Secretary of War of the United States to place his said two set nets in the waters of the Columbia River, for the purpose of fishing for salmon fish in said water; but this defendant [49] denies that said Secretary of War has now or ever had any authority over said two set nets; and denies that the Secretary of War of the United States or that any officer of the Government of the United States has any right or authority to regulate fishing or fishing rights in the waters of the said Columbia River; and denies that it is necessary to receive authority from the Secretary of War or from any officer of the Government of the United States, in order for defendant to fish his said two set nets or fish nets at the location where the same were located at the time of the commencement of this action; and denies that the Secretary of War or any other officer of the United States has any authority whatever to regulate or interfere with fishing for salmon fish in the waters of the Columbia River.

And this defendant denies that plaintiff has any right to raise or litigate any such question in this proceeding.

Defendant, further answering unto said amended bill or complaint of plaintiff, denies all and all manner of unlawful combination and confederacy wherewith he is by the said amended bill charged; without this there is no other matter, cause or thing in said complainant's said amended bill of complaint contained material or necessary for this defendant to make answer to,

and not herein and hereby well and sufficiently answered confessed, traversed and avoided or denied is true to the knowledge or belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable Court shall direct; and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this honorable Court may seem meet and in accordance with equity. [50]

### **Separate Answer and Defense.**

And this defendant, H. S. McGowan, now and at all times hereafter saving to himself all and all manner of benefit of exception or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections in the said amended bill contained, for answer thereto or to as much thereof as this defendant is advised to make answer, says:

And for a further answer and defense unto the cause of action alleged in plaintiff's amended bill of complaint, says, avers, and alleges as follows:

#### **1.**

That H. S. McGowan, this defendant, is now and was at all of the times hereinafter in this separate answer and defense mentioned, a citizen of the United States of America, over the age of twenty-one-years, and a citizen and resident of Pacific County, in the State of Washington, and competent to own and operate set nets and other appliances for catching salmon fish in the State of Washington,

and in the Columbia River, in said county and State.

2.

That the plaintiff, Columbia River Packers' Association, is now and was at all the times hereinafter in this separate answer and defense mentioned, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and that it filed in the office of the Secretary of State of the State of Washington a certified copy of its articles of incorporation, and filed in the office of the Secretary of State of State of Washington, a designation in writing of R. A. Hawkins, as its statutory agent upon whom service of summons or process may be made or had, and that plaintiff is now and was at all [51] of the times hereinafter alleged, a citizen of the State of Oregon.

3.

That heretofore and on the 15th of April, 1908, pursuant to the laws of the State of Washington, this defendant applied to the Fish Commissioner of the State of Washington for a license to operate and fish for salmon fish, two set nets in the waters of the Columbia River, in Pacific County, Washington, and at the place where said set nets were located at the time of the commencement of this action, as hereinafter alleged; and then and there defendant paid the Fish Commissioner the license fee exacted by said Fish Commissioner and the laws of the State of Washington, to wit, the sum of \$2.50 for license number 1431, and \$2.50 for license number 1432. Thereupon said Fish Commissioner, on the 15th of April, 1908, issued and delivered to this defend-



ant, H. S. McGowan, two licenses to operate set nets in the Columbia River, and numbered respectively 1431 and 1432, and thereupon this defendant was entitled of right to operate two set nets for the purpose of catching salmon fish in the waters of the Columbia River, within the State of Washington, from said date and for a period of one year thereafter, and said licenses are under the laws of the State of Washington renewable each year after issuance. That said licenses and each of them contains the name of H. S. McGowan, as the person to whom said licenses were granted, and specifies the number of said set net for which it was issued.

## 4.

That under and pursuant to said licenses and the laws of the State of Washington, this defendant, H. S. McGowan, did, on or about the 16th of June, 1908, cause the location for said [52] set nets to be made by securely anchoring a buoy on the location, for each set net, upon which he posted, or caused to be posted, the number of the license under which the said respective set nets *was* operated, to wit: Numbers 1431 and 1432.

## 5.

That the point and place in the waters of the Columbia River, in Pacific County, Washington, where this defendant did, on the 16th of June, 1908, under license No. 1432 locate his said set nets, was and is described as follows, to wit:

At a point in the Columbia River in Pacific County, Washington, which is about 700 feet in a easterly direction from the place known and com-



monly called "Great Republic Wreck" in front of Sand Island, in the Columbia River, beyond the line of ordinary and also extreme low tide, and beyond the line of extreme low water, in said Columbia River, and between said point of extreme low water and the adjacent channel of said Columbia River and said set net is situated in said Columbia River, and in front of but beyond Sand Island; and which said set net and the location thereof was being fished and operated by defendant for the purpose of catching salmon fish under license number 1432, issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908; and that on the 16th of June, 1908, this defendant caused the location of said set net to be made by securely anchoring a buoy in the waters of said river, on the above-described location of his said set net, upon which he, at said time and place, posted and caused to be posted the number of the license under which said set net was operated, to wit: Number 1432, and said set net did not at the time of the commencement of this action nor at any other time, occupy more than one-third of the width of said Columbia River, [53] and did not extend out to the *man ships'* channel thereof, and that the point and place in the waters of the Columbia River in Pacific County, where this defendant did, on or about the 16 of June, 1908, locate his said set net, under license number 1431, is described *and* follows:

At a point in the Columbia River, in Pacific County, Washington, about 200 feet in an *easterly* from what is known and called "Great Republic Wreck" in front of Sand Island, and that said set

net is located in front of said Sand Island, but beyond the line of ordinary low tide and extreme low tide, and beyond the line of low water, and between the point of extreme low tide and low water and the adjacent channel of said river. That each of said set nets was located by use of a stone anchor, weighing about 300 pounds, to which was attached a piece of 7/16 inch chain, about 5 feet long, which was clamped to a wire rope, about 25 feet long, to which was attached a cedar buoy, about 4 feet long and 8 inches square, upon which buoy was securely fastened the license number of each location.

## 6.

That said license duly authorized and empowered, and authorizes and empowers this defendant to fish and operate said set nets, on said respective locations in the waters of the Columbia River, in the State of Washington and during the entire fishing seasons of 1908 for the purpose of catching salmon fish; and defendant ever since on or about the 16th of June, 1908, has fished and operated each of said set nets, for the purpose of catching *of catching* salmon fish at the locations aforesaid, in the waters of the Columbia River, in Pacific County, Washington, until interfered with by plaintiff, as hereinafter alleged, and until enjoined by the order of the Court [54] in this proceeding.

## 7.

That each of said set nets was constructed by means of rope, twine, cord, and lead, and the meshes of each of said set nets were more than three inches stretch measure, and was securely fastened so that it re-

maintained in its said location in said Columbia River, and fish were caught in the same, until said set nets and each of them was interfered with by plaintiff as hereinafter averred and alleged, and their operation enjoined by this Court in this proceeding. [55]

## 8.

That ever since the 16th of June, 1908, this defendant maintained his said locations of his said set nets, and maintained and operated and fished for the purpose of catching salmon fish said set nets and each of them, until interfered with by plaintiff as hereinafter in this answer alleged and averred, and until enjoined by the order of this Court. That said set nets and each of them caught fish and fish were caught therein in the following manner and would now be caught in said set nets and each of them in the following manner, were this defendant permitted by this Court to operate and fish for salmon fish said set nets, and each of them, to wit: Fish were and would be caught in said set nets, and each of them, by entangling themselves in said set nets, and become fast therein, and after they are caught then they are taken out of said set nets by a man or men in small boats, which boat is afloat on the water.

## 9.

That said defendant was and is entitled to a lateral passageway of at least 300 feet, and an end passageway of 30 feet, between each of his said set nets and all other fishing appliances placed on said Columbia River, or to be placed in said river; and it is a crime under the laws and statutes of the State of Washington, and punishable under said laws, for any person



to construct or own or operate any appliance for the purpose of catching fish and salmon fish, in said waters, without leaving for this defendant's said set nets, and each of them, an end passageway of at least 30 feet and a lateral passageway of at least 300 feet. That between each of said defendant's said set [56] nets, there was on the 16th of June, 1908, at the time of the location of the same, an end passageway of at least 30 feet, and a lateral passageway of at least 300 feet, between said set nets and said distance remained between said set nets, until said plaintiff did, as hereinafter alleged, go upon said set nets and upon the locations of this defendant's said set nets.

## 10.

That this defendant prior to the commencement of this action, expended large sums of money in acquiring the rights of fishing and operating said set nets, and each of them, and that said fishing rights, and set nets and each of them, was of much value and profit to this defendant, by reason of the salmon fish caught and to be caught in this defendant's said set nets during the fishing seasons of the year 1908 and future years. That salmon fish on and in the Columbia River, are of great value and ascend the river in large numbers and schools, at certain periods during each year, and on the 16th of June, 1908, and at all times thereafter, they were in said river in large quantities, and were ascending said river, and will ascend said river in large quantities this and each future year. That salmon fish are of great merchantable value, and defendant was, on June 16th, 1908 and at all times until enjoined by this Court, en-



gaged in the business of operating his said set nets and each of them for the purpose of catching salmon fish therein, for sale in the market, and defendant has derived and expects to derive large profits from his said set nets; and that said set nets and each of them is of much value by reason of the salmon fish caught and to be caught therein. That there is now and there will continue to be, during all of the fishing seasons of the year 1908, and future years, a large number and many valuable salmon fish in said [57] Columbia River, at the place where this defendant's set nets and each of them was located and operated at the time that the operation of said set nets was enjoined by the order of this Court in this proceeding.

## 11.

That at the same place and location where this defendant's set nets and each of them was located, fished and operated from the 16th of June, 1908, as aforesaid, and until enjoined by the order of this Court in this proceeding, said locations and each of them was fished and operated for the purpose of catching salmon fish during the fishing seasons of the year 1902 and during the fishing seasons of each and every year since said year up to and including the year 1907, by this defendant's predecessors in interest, for that defendant's predecessors in interest fished and operated said locations for the purpose of catching salmon fish with fishing appliances, authorized by the laws of the State of Washington, under licenses duly issued by the Fish Commissioner of the State of Washington, for each and all of the years

1902 and until 1907, inclusive, and this defendant, in the manner required by law, acquired said interest in said locations; and that under said licenses issued as aforesaid, by the Fish Commissioner of the State of Washington, to this defendant, this defendant had located and was operating, occupying and fishing with his said two set nets for salmon fish, his said locations of his said two set nets, long prior to the time that plaintiff attempted to secure a location thereon and long prior to the time that plaintiff commenced fishing on said locations, with its said drag seines, as hereinafter alleged, for that plaintiff did not attempt to secure any fishing location on defendant's said locations, *not* commence fishing [58] on said grounds, and locations, until on or about the 2d or 3d of July, 1908.

That under the laws of the State of Washington, this defendant is entitled to the sole, prior and exclusive right to the locations which were occupied by this defendant's said set nets, at the time of the commencement of this action; and was then and is now entitled to the sole, prior and exclusive right to fish on said locations, for salmon fish, with his said set nets, during the fishing season of this and future years.

12.

That defendant, at the time of the commencement of this action, and ever since the 16th of June, 1908, was fishing and operating said set nets, in the usual way, and in the only manner in which they could be fished and operated for the purpose of catching salmon fish; and was in no way, and in no manner, inter-

fering with the Sites Number Two or Three which plaintiff alleges in its complaint it leased, for defendant's said set nets were and will be fished and operated solely and entirely from boats upon the waters of said Columbia River, at a point beyond low tide and low water if permitted by this Court and in so fishing said set nets, defendant never did and defendant does not intend to and it is not necessary to trespass or go upon or over said Sites Number Two and Three or any part thereof, for that said sites do not extend beyond low waters in the waters of the Columbia River.

## 13.

That said set nets as located and fished by this defendant did not, and of this Court permits them to be fished and operated, will not interfere with navigation in said river, [59] for the purpose of trade and commerce, or for any other purpose, for which the navigation of said river is used or can be used, for that said set nets were so constructed as not to extend to the adjacent channel of said river, and the water at the place of the location of said set nets, does not exceed six feet in depth at low tide, and neither of said set nets by lead or any parts thereof extended or occupied more than one-third of the width of said river, but occupied much less than one-third of the width of said river.

## 14.

That each of this defendant's said set nets and exclusive right to fish same were and are of the reasonable value of \$10,000.00, and said set nets and each of them catch a great many valuable salmon fish, and if



this defendant is permitted to fish and operate them they will catch a great many valuable salmon fish, amounting to many thousand dollars' worth, but the exact amount or value it is impossible to determine; that salmon fish are of great mercantile value, and that during the fishing seasons of the year 1908 and future years, this defendant, if permitted to operate his said set nets will catch therein many valuable salmon fish of great value and worth many thousand dollars, but the exact amount of salmon fish, or the value of the salmon fish that defendant would catch in said nets cannot be estimated or computed.

## 15.

That neither of defendant's said set nets or any part thereof were at any time an obstruction to navigation in said Columbia River. And if defendant is permitted to operate said set nets, at the place and location where the same were at the time of the commencement of this action, the same will not constitute *be* an obstruction, in or to the navigable waters of [60] said Columbia River nor to the navigation of said river. That no part of either of defendant's said set nets or the said buoys which mark the locations thereof were at any time any obstruction in or to the navigation of said Columbia River, for that said set nets, and the locations thereof, were not in the navigable portions of said river; for the water at the place where said set nets were located at the time of the commencement of this action, of said river, does not exceed six feet in depth at low tide, and said set nets or any or either of them did not extend out to the channel of said river, nor to the part of said



river used by boats or vessels in plying the waters of the Columbia River, for the purpose of trade or commerce.

## 16.

That neither of defendant's said set nets nor any part thereof was upon any part of said Site Number Two or Three or any part thereof, which plaintiff in its complaint alleges that it leased from the Secretary of War of the United States. And the place where said set nets and each of them was located was not and is not upon said Site Two or Three or any part thereof. That said set nets nor the operating and fishing of the same by this defendant, did not interfere with or prevent plaintiff from ingress to and egress from said Sites Number Two and Three of Sand Island, mentioned in plaintiff's complaint. And if defendant is permitted to operate said set nets at the place where the same were located at the time of the commencement of this action, the same will not interfere with or prevent plaintiff from ingress to or egress from said Sand Island.

## 17.

That the defendant intends to and will fish and operate, for salmon fish, said set nets at the same place and location [61] where they were located, on or about the 16th of June, 1908, if permitted by this Court, and unless restrained and prohibited by this Court in this proceeding upon final hearing. That the said set nets of this defendant were and constitute obstructions and are the things which plaintiff alleges in its complaint were and constitute obstructions and are the things of which the plain-

tiff in its complaint complains.

## 18.

That while this defendant was operating and fishing for salmon fish, his said set nets and each of them, at the location and place where the same were located in the waters of the Columbia River in Pacific County, Washington, as aforesaid, and on or about the second or third of July, 1908, and at other dates and times since said date, the complainant and plaintiff in the above-entitled action, its agents, officers, and servants, unlawfully and wrongfully, and without the consent of this defendant, entered upon the lateral passageway and location and also upon the end passageway and location of defendant's said set nets, and of each of them, and upon and over the location of said set nets, and each of them, and then and there unlawfully and wrongfully, and without the consent of this defendant, with drag seines did fish with said drag seines for the purpose of catching salmon fish in said seines on the location of this defendant's said set nets and each of them, and did catch salmon fish in their said drag seines, which otherwise would have been caught in defendant's said set nets, and each of them; and ever since said time, the plaintiff has wrongfully and unlawfully, and without the consent of this defendant, daily fished for the purpose of catching salmon fish, with its said drag seines, upon the lateral passageway and location and also upon the end passageway and location, of said defendant's said set nets, and each of them, [62] and upon and over the said set nets and each of them, and are now catching salmon fish in its said drag seines, which would

otherwise be caught in defendant's said set nets, and each of them, were defendant permitted to operate and fish his said set nets, by this Court; that thereby, complainant and plaintiff is irreparably damaging and injuring this defendant, and that the damages have and will amount to many thousands of dollars, but it is impossible to measure said damages in money, for it is impossible to say how many salmon fish plaintiff would catch in said drag seines, or how many fish it will daily catch therein, or how many salmon fish this defendant would catch in his said set nets if permitted to operate the same by Court, but defendant alleges that up to the present time he has been damaged by reason thereof in the sum of at least \$20,000.00.

19.

That the plaintiff, its agents, officers and servants, will daily continue to fish for salmon fish, with said drag seines, upon the location of this defendant's said set nets and upon and over said set nets, and upon and over the lateral location and passageway of said defendant's said set nets, and each of them and upon and over the end location and passageway of said defendant's said set nets and each of them, and over said defendant's said set nets and each of them, during the entire fishing season of the year 1908 and future years, with plaintiff's said drag seines, for the purpose of catching fish in said drag seines, unless restrained by this Court.

20.

That said trespass, herein complained of, and which has been and is now being committed by the



plaintiff, its agents, officers, and servants, as aforesaid, will, unless restrained, [63] continue daily and will prevent this defendant from fishing for salmon fish said set nets, and each of them, and that if plaintiff is permitted to maintain and fish its said drag seines, as aforesaid, this defendant will not be able to use or fish for salmon fish in said waters of said Columbia River, in Pacific County, Washington, his said set nets, or either of them, and this defendant will thereby be irreparably damaged; and that the damages will amount to many thousands of dollars, but it is impossible to measure said damages in money for it is impossible to ascertain how many fish this defendant would catch in his said set nets during the fishing season of this and future years if the plaintiff did not fish for salmon fish upon and over the location of defendant's said set nets, and if the plaintiff did not prevent this defendant from fishing and operating this defendant's said set nets, and each of them.

## 21.

That on the second and third of July, 1908, and ever since said time and at the present time, the plaintiff endeavored to prevent and now endeavors to prevent this defendant from fishing and operating his said set nets for the purpose of catching salmon fish at the location and place where they were located as aforesaid, at the time of the commencement of this action; and that on the second and third days of July, 1908, plaintiff claimed, and ever since said time has claimed and now claims, the exclusive right of fishery and the exclusive right to fish for salmon



fish at the place where this defendant's said set nets were fished and operated at the time of the commencement of this action; and endeavored to exclude this defendant and prevent this defendant from fishing his said set nets and each of them, at the location as aforesaid; and that plaintiff [64] will continue to exercise the exclusive right of fishery on and over defendant's said set nets, and at the place where the same were located at the time of the commencement of this action; unless restrained by this Court and will daily thus continue to harass and annoy this defendant; and will continue to endeavor to prevent and will prevent this defendant from fishing and operating his said set nets and each of them, unless restrained by this Court.

## 22.

That the plaintiff and complainant threaten to and will, unless restrained by this Court, continue daily to fish and operate, for the purpose of catching salmon fish, its said drag seines, and other fishing appliances, upon the lateral location and also upon the end passageway of defendant's said set nets and each of them, and on and over said set nets; and threaten to and will, unless restrained by this Court, prevent this defendant from fishing or operating his said set nets, for the purpose of catching salmon fish; and that the plaintiff will, unless restrained by the order of this Court, exercise the exclusive right of fishery at the place where defendant's set nets were situated at the time of the commencement of this action; and will, unless restrained by the order of this Court, prevent this defendant from ever fishing or

operating, for the purpose of catching salmon fish, said set nets or any or either of them.

23.

That this defendant does not have a plain, speedy or adequate remedy at law for the redress of the grievances herein complained of by this defendant.

24.

That an emergency exists and this defendant is entitled [65] to a permanent injunction forever enjoining plaintiff from maintaining or operating said seines or any or either of them on the lateral location and end passageway of any of defendant's said set nets, and from interfering with this defendant's right to fish and operate defendant's said nets.

WHEREFORE, this defendant, having fully answered, confessed, traversed and denied all matters in the said amended bill of complaint material to be answered, according to his best knowledge and belief, prays this honorable Court to enter its judgment and decree; that plaintiff take nothing by its said action, and that this defendant be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained; and that the Court grants unto this defendant such other further and separate relief in the premises as to this Court may seem meet and in accordance with equity.

H. S. McGOWAN,

Defendant.

WELSH, WELSH, & O'PHELAN,

Attorneys and Solicitors for Defendant H. S. McGowan, Residence and Address South Bend, Pacific County, Washington.

State of Washington,  
County of Pacific,—ss.

I, H. S. McGowan, being first duly sworn, upon my oath do depose and say :

That I am one of the defendants in the above-entitled action and proceeding; that I am answering defendant herein; that I have read the above and foregoing answer, and said affirmative [66] answer and defense, and know the contents thereof, and that each and every allegation made and thing therein contained is true. Excepting as to such matters and things as are alleged are based on my information and belief, and to those matters and things, I verily believe the same and the whole thereof to be true.

H. S. McGOWAN. [Seal]

Subscribed in my presence and sworn to before me this 26th day of August, A. D. 1908.

JOHN T. WELSH,

Notary Public for the State of Washington, Residing at South Bend, in Said State. [67]

### **Cross-bill and Complaint.**

For a cross-bill and for affirmative relief, this defendant H. S. McGowan, your orator, shows to the honorable Judges of the Circuit Court of the United States of America, in and for the Western District of Washington, Western Division, the following facts, and your orator avers, says and alleges, as follows:

## 1.

That H. S. McGowan, this defendant, your orator is now, and was at all of the times hereinafter in this separate answer and defense mentioned, a citizen of the United States of America, over the age of twenty-one years, and a citizen and a resident of Pacific County, in the State of Washington, and competent to own and operate set nets and other appliances for catching salmon fish in the State of Washington, and in the Columbia River, in said county and State.

## 2.

That the plaintiff, Columbia River Packers' Association, is now and was at all the times hereinafter in this separate answer and defense mentioned, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and that it filed in the office of the Secretary of State of the State of Washington, a certified copy of its articles of incorporation, and filed in the office of the Secretary of State of the State of Washington, a designation in writing of R. A. Hawkins, as its statutory agent upon whom service of summons or process may be made or had, and that plaintiff is now and was at all of the times hereinafter alleged, a citizen of the State of Oregon. [68]

## 3.

That heretofore and on the 15th of April, 1908, pursuant to the laws of the State of Washington, this defendant, your orator, applied to the Fish Commissioner of the State of Washington, for licenses to operate and fish for salmon fish, two set nets in



the waters of the Columbia River, in Pacific County, Washington, and at the place where said set nets were located at the time of the commencement of this action, as hereinafter alleged; and then and there defendant, your orator, paid the said Fish Commissioner the license fee exacted by said Fish Commissioner and the laws of the State of Washington, to wit, the sum of \$2.50 for license number 1431, and \$2.50 for license number 1432. Thereupon said Fish Commissioner, on the 15th of April, 1908, issued and delivered to this defendant, your orator, H. S. McGowan, two licenses to operate set nets in the Columbia River, and numbered respectively 1431 and 1432, and thereupon this defendant, your orator, was entitled of right to operate two set nets for the purpose of catching salmon fish in the waters of the Columbia River, within the State of Washington, from said date and for a period of one year thereafter, and said licenses are under the laws of the State of Washington renewable each year after issuance. That said licenses and each of them contains the name of H. S. McGowan, as the person to whom said licenses were granted, and specifies the number of said set net for which it was issued.

4.

That under and pursuant to said licenses and the laws of the State of Washington, this defendant, your orator, H. S. McGowan, did on or about the [69] 16th of June, 1908, cause the location for said set nets to be made by securely fastening a buoy on the location, for each set net, upon which he posted, or caused to be posted, the number of the license

under which the said respective set nets *was* operated, to wit: Nos. 1431, 1432.

## 5.

That the point and place in the waters of the Columbia River in Pacific County, Washington, where this defendant, your orator, did on the 16th of June, 1908, locate his said set nets, under license No. 1432 was and is described as follows, to wit:

At a point in the Columbia River in Pacific County, Washington, which is about 700 feet in an easterly direction from the place known and commonly called "Great Republic Wreck," in front of Sand Island, in the Columbia River, beyond the line of ordinary and also of extreme low tide, in said Columbia River, and the adjacent channel of said Columbia River, and said set net is situated in said Columbia River, and in front of but beyond Sand Island; and which said set net and the location thereof was being fished and operated by defendant, for the purpose of catching salmon fish under license number 1436, issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908; and that on the 16th of June, 1908, this defendant, your orator, caused the location of said set net to be made by securely anchoring a buoy in the waters of said river, on the above-described location of his said set net, upon which he, at said time and place, posted and caused to be posted the number of the license under which said set net was operated, to wit: Number 1432, and said set net did not at the time of the commencement of this action, nor at any other time, occupy more than one-

third of the width [70] of said Columbia River, and did not extend out to the main ships' channel thereof, and that the point and place in the waters of the Columbia River in Pacific County, Washington, where this defendant, your orator, did, on or about the 16th of June, 1908, locate his said set net, under license number 1431, is described as follows:

At a point in the Columbia River, in Pacific County, Washington, about 200 feet in an easterly direction from what is known and called "Great Republic Wreck" in front of Sand Island, and that said set net is located in front of Sand Island, but beyond the line of ordinary low tide and extreme low tide, and beyond the line of low water, and between the point of extreme low tide and low water, and the adjacent channel of said river. That each of said set nets was located by use of a stone anchor, weighing about 300 pounds, to which was attached [71] a piece of 7/16 inch chain, about 5 feet long, which was clamped to a wire rope, about 25 feet long, to which was attached a cedar buoy, about 4 feet long and 8 inches square, upon which buoy was securely fastened the license number of each location.

6.

That said license duly authorized and empowered, and authorizes and empowers this defendant, your orator, to fish and operate said set nets, on said respective locations in the waters of the Columbia River, in the State of Washington, and during the entire fishing seasons of 1908 for the purpose of catching salmon fish; and defendant, your orator, ever since on or



about the 16th of June, 1908, has fished and operated each of said set nets, for the purpose of catching salmon fish at the locations aforesaid, in the waters of the Columbia River, in Pacific County, Washington, until interfered with by plaintiff as hereinafter alleged, and until enjoined by the order of the Court in this proceeding.

## 7.

That each of said set nets was constructed by means of rope, twine, cord, and lead and the meshes of said set nets was more than three inches stretch measure, and was securely fastened so that it remained in its said location in said Columbia River, and fish were caught in the same, until said set nets and each of them was interfered with by plaintiff as hereinafter averred and alleged, and their operation enjoined by this Court in this proceeding.

## 8.

That ever since the 16th of June, 1908, this defendant, your orator, maintained his said locations of his said set nets, and maintained and operated and fished for the purpose [72] of catching salmon fish said set nets and each of them, until interfered with by plaintiff as hereinafter in this answer alleged and averred, and until enjoined by the order of this Court. That said set nets and each of them caught fish and fish were caught therein in the following manner, and would now be caught in said set nets and each of them in the following manner, were this defendant, your orator, permitted by this Court to operate and fish for salmon fish said set nets, and each of them, to wit: Fish were and would be caught



in said set nets, and each of them, by entangling themselves in said set nets, and becoming fast therein, and after they are caught, then they are taken out of said set nets by a man or men in small boats, which boat is afloat on the water.

## 9.

That said defendant, your orator, was and is entitled to a lateral passageway of at least 300 feet and an end passageway of 30 feet, between each of his said set nets, and all other fishing appliances placed on said Columbia River, or to be placed in said river; and it is a crime under the laws and statutes of the State of Washington, and punishable under said laws, for any person to construct or own or operate any appliance for the purpose of catching fish and salmon fish, in said waters, without leaving for this defendant's, your orators, said set nets, and each of them, an end passageway of at least 30 feet, and a lateral passageway of at least 300 feet. That between each of said defendant's, your orator's, said set nets, there was, on the 16th of June, 1908, at the time of the location of the same, an end passageway of at least 30 feet, and a lateral passageway of at least 300 feet, between said set nets, and said distance remained between said set nets, until said plaintiff did, as [73] *as* hereinafter alleged, go upon said set nets, and upon the locations of this defendant's, your orator's, said set nets.

## 10.

That this defendant, your orator, prior to the commencement of this action, expended large sums of money in acquiring the rights of fishing and operat-

ing said set nets, and each of them, and that said fishing rights, and said set nets and each of them, was of much value and profit to this defendant, your orator, by reason of the salmon fish caught and to be caught in this defendant's, your orator's, said set nets, during the fishing seasons of the year, 1908 and future years. That salmon fish on and in the Columbia River, are of great value and ascend the river in large numbers and schools at certain periods during each year, and on the 16th of June, 1908, and at all times thereafter, they were in said river in large quantities and were ascending said river, and will ascend said river in large quantities this and each future year. That salmon fish are of great merchantable value, and defendant, your orator, was on June 16th, 1908, and at all times enjoined by this Court, engaged in the business of operating his said set nets, and each of them, for the purpose of catching salmon fish therein, for sale in the market, and defendant, your orator, has derived and expects to derive large profits from his said set nets; and that said set nets, and each of them, is of much value by reason of the salmon fish caught and to be caught therein. That there is now and there will continue to be, during all the fishing seasons of the year 1908, and future years, a large number and many valuable salmon fish in said Columbia River, at the place where this defendant's, your orator's, said set nets and each of them was located and operated at the time that the operation of said set [74] nets was enjoined by the order of this Court, in this proceeding.

## 11.

That at the same place and location where this defendant's your orator's, set nets, and each of them was located, fished and operated, from the 16th of June, 1908, as aforesaid, and until enjoined by the order of this Court in this proceeding, said locations and each of them was fished and operated for the purpose of catching salmon fish during the fishing seasons of the year 1902 and during the fishing seasons of each and every year since said year up to and including the year 1907, by this defendant's your orator's, predecessors in interest, for that defendant's, your orator's, predecessors in interest fished and operated said locations for the purpose of catching salmon fish with fishing appliances, authorized by the laws of the State of Washington, under licenses duly issued by the Fish Commissioner of the State of Washington, for each and all of the years 1902 and until 1907, both inclusive, and this defendant, your orator, in the manner required by law, purchased said interest in said locations; and that under said licenses issued as aforesaid, by the Fish Commissioner of the State of Washington, to this defendant, your orator, this defendant, your orator had located and was operating, occupying and fishing with his said set nets for salmon fish his said locations of his said set nets, long prior to the time that plaintiff attempted to secure a location thereon and long *prior that* plaintiff commenced fishing on said locations, with its said drag seines, as hereinafter alleged, for that plaintiff did not attempt to secure any fishing location on defendant's, your orator's, said locations nor com-



menced fishing on said grounds, and locations until on or about the 2d or 3d of July, 1908. [75]

That under the laws of the State of Washington, this defendant, your orator, is entitled to the sole, prior and exclusive right to the locations which were occupied by this defendant's, your orator's, said set nets, at the time of the commencement of this action; and was then and is now entitled to the sole, prior and exclusive right to fish on said locations, for salmon fish, with his said set nets, during the fishing season of this and future years.

12.

That defendant, your orator, at the time of the commencement of this action, and ever since the 16th of June, 1908, was fishing and operating said set nets, in the usual way, and in the only manner in which they could be fished and operated for the purpose of catching salmon fish; and was in no way, and in no manner, interfering with the Sites Number Two or Three which plaintiff alleges in its complaint it leased; for defendant's, your orator's, said set nets, were and will be fished and operated solely and entirely from boats upon the waters of said Columbia River, at a point beyond low tide and low water, if permitted by the Court, and in so fishing said set nets, defendant, your orator, never did and defendant, your orator, does not intend to and it is not necessary to trespass or go upon or over said Sites Number Two and Three or any part thereof, for that said sites do not extend beyond low waters in the waters of the Columbia River.



## 13.

That said set nets as located and fished by this defendant, your orator, did not and if this Court permits them to be fished and operated, will not interfere with navigation [76] in said river, for the purpose of trade and commerce, or for any other purpose, for which the navigation of said river is used, or can be used, for that said set nets, were so constructed as not to extend to the adjacent channel of said river, and the water at the place of the location of said set nets does not exceed six feet in depth at low tide, and neither of said set nets by lead or any parts thereof extended or occupied more than one-third of the width of said river, but occupied much less than one-third of the width of said river.

## 14.

That each of this defendant's, your orator's, said set nets and the exclusive rights to fish the same were and are of the reasonable value of \$10,000.00, and said set nets, and each of them, catch a great many valuable salmon fish, and if this defendant, your orator, is permitted to fish and operate them they will catch a great many valuable salmon fish, amounting to many thousand dollars' worth, but the exact amount or value it is impossible to determine; that salmon fish are of great mercantile value, and that during the fishing seasons of the year 1908 and future years, this defendant, your orator, if permitted to operate his said set nets, will catch therein many valuable salmon fish of great value and worth many thousand dollars, but the exact amount of salmon fish, or the value of the salmon fish that defendant, your orator, would

catch in said nets cannot be estimated or computed.

## 15.

That neither of defendant's, your orator's, said set nets or any part thereof, were at any time an obstruction to navigation in said Columbia River. And if defendant, your orator, is permitted to operate said set nets, at the place and [77] location where the same were at the time of the commencement of this action, the same will not constitute or be an obstruction, in or to the navigation of the Columbia River nor to the navigable waters of said river. That no part of either of defendant's, your orator's, said set nets, or the said buoys, which mark the locations thereof, were at any time *any time* any obstruction in or to the navigation of said Columbia River, for that said set nets, and the locations thereof, were not in the navigable portions of said river, for the water at the place where said set nets were located at the time of the commencement of this action *of* said river, does not exceed six feet in depth at low tide, and said set nets or any or either of them did not extend out to the channel of said river, nor to the part of said river used by boats or vessels in plying the waters of the Columbia River, for the purpose of trade or commerce.

## 16.

That neither of defendant's, your orator's, said set nets, nor any part thereof was upon any part of said Site Number Two or Three or any part thereof which plaintiff in its complaint alleges that it leased from the Secretary of War of the United States, and the place where said set nets and each of them was

located was not and is not upon said Sites Two or Three or any part thereof. That said set nets nor the operating and fishing of the same by this defendant, your orator, did not interfere with or prevent plaintiff from ingress to or egress from said Sites Number Two and Three of Sand Island, mentioned in plaintiff's complaint. And if defendant, your orator, is permitted to operate said set nets, at the place where the same were located at the time of the commencement of this action, the same will not interfere with or prevent plaintiff from ingress to or egress from said Sand Island. [78]

17.

That the defendant, your orator, intends to and will fish and operate for salmon fish, said set nets at the same place and location where they were located, on or about the 16th of June, 1908, if permitted by this Court, and unless restrained and prohibited by this Court, in this proceeding, upon final hearing. That the said set nets of this defendant, your orator, were and are the things which the said plaintiff alleges in its complaint were and constitute obstructions to the navigation of said river, and are the things of which the plaintiff in its complaint complains.

18.

That while this defendant, your orator, was operating and fishing for salmon fish, his said set nets and each of them at the location and place where the same were located in the waters of the Columbia River, in Pacific County, Washington, as aforesaid, and on or about the second or third of July, 1908, and at other



dates and times since said date, the complainant and plaintiff in the above-entitled action, its agents, officers, and servants, unlawfully and wrongfully and without the consent of this defendant, your orator, entered upon the lateral passageway and location and also upon the end passageway and location of defendant's, your orator's, said set nets, and each of them, and upon and over the location of said set nets, and each of them, and upon and over the location of said set nets, and each of them, and then and there unlawfully and wrongfully, and without the consent of this defendant, your orator, with drag seines, did fish with said drag seines for the purpose of catching salmon in said seines on the location of this defendant's, your orator's, said set nets and each of them, and did [79] catch salmon fish in their said drag seines, which otherwise would have been caught in defendant's, your orator's, said set nets, and each of them; and ever since said time, the plaintiff has wrongfully and unlawfully, and without the consent of this defendant, your orator, daily fished for the purpose of catching salmon fish, with its said drag seines, upon the lateral passageway and location and also upon the end passageway and location, of said defendant's, your orator's, said set nets, and each of them, and upon and over the said set nets and each of them, and are now catching salmon fish in its drag seines, which would otherwise be caught in defendant's, your orator's, said set nets, and each of them, and are now catching salmon fish in its said drag seines which would otherwise be caught in defendant's, your or-



ator's, said set nets, and each of them, were defendant, your orator, permitted to operate and fish his said set nets by this Court; that thereby complainant and plaintiff is irreparably damaging and injuring this defendant, your orator, and that the damages will amount to many thousands of dollars, but it is impossible to measure said damages in money, for it is impossible to say how many salmon fish plaintiff would catch in said drag seines, or how many fish it will daily catch therein, or how many salmon fish this defendant, your orator, would catch in his said set nets, if permitted to operate the same.

## 19.

That the plaintiff, its agents, officers and servants, will daily continue to fish for salmon fish, with said drag seines, upon the location of this defendant's, your orator's, said set nets, and upon and over said set nets, and upon and over the lateral location and passageway of said defendant's, your orator's, [80] said set nets, and each of them, and upon and over the lateral location and passageway of said defendant's, your orator's, said set nets, and each of them, and over the end location and passageway of said defendant's, your orator's, said set nets, and each of them, during the entire fishing season of the year 1908 and future years, with plaintiff's said drag seines, for the purpose of catching fish in said drag seines, unless restrained by this Court.

## 20.

That said trespass, herein complained of, and which has been and is now being committed by the plaintiff, its agents, officers, and servants, as afore-

said, will, unless restrained, continue daily and will prevent this defendant, your orator, from fishing for salmon fish said set nets, and each of them, and that if plaintiff is permitted to maintain and fish its said drag seines, as aforesaid, this defendant, your orator, will not be able to use or fish for salmon fish in said waters of said Columbia River, in Pacific County, Washington, his said set nets, or either of them, and this defendant, your orator, will thereby be irreparably damaged; and that the damages will amount to many thousands of dollars, but it is impossible to measure said damages in money for it is impossible to ascertain how many fish this defendant, your orator, *would in* his said set nets during the fishing season of this and future years, if the plaintiff did not fish for salmon fish upon and over the location of defendant's, your orator's, said set nets, and if the plaintiff did not prevent this defendant from fishing and operating this defendant's, your orator's, said set nets, and each of them.

## 21.

That on the second and third of July, 1908, and ever [81] since said time and at the present time, the plaintiff endeavored to prevent and now endeavors to prevent this defendant, your orator, from fishing and operating his said set nets for the purpose of catching salmon fish at the location and place where they were located as aforesaid, at the time of the commencement of this action; and that on the second and third days of July, 1908, plaintiff claimed, and ever since said time has claimed and now claims, the exclusive right of fishery and the exclusive right to

fish for salmon fish at the place where this defendant's, your orator's, said set nets, were fished and operated at the time of the commencement of this action; and endeavored to exclude this defendant, your orator, and prevent this defendant, your orator, from fishing his said set nets and each of them, at the locations as aforesaid; and that plaintiff will continue to exercise the exclusive right of fishery on and over defendant's, your orator's, said set nets, and at the place where the same were located at the time of the commencement of this action, unless restrained by this Court; and will daily thus continue to harass and annoy this defendant, your orator, from fishing and operating his said set nets, and each of them, unless restrained by this Court.

21½.

That because your orator has been enjoined in this suit and prevented from fishing for the purpose of catching salmon fish, each of his said set nets, in the waters of the Columbia River, in Pacific County, Washington, and at the locations hereinabove alleged, he has been damaged in the sum of many thousand dollars, but it is impossible to allege or state specifically the exact amount of money in which your orator alleges and avers that he has been damaged in the sum of at least \$20,000.00 up to the present time, as near as your orator can now state and aver.

22.

That the plaintiff and complainant threatened to and will [82] unless restrained by this Court, continue daily to fish and operate for the purpose of catching salmon fish, its said drag seines and other



fishing appliances, upon the lateral location and also upon the end passageway of defendant's, your orator's, said set nets, and each of them, and on and over said set nets; and threatened to and will unless restrained by this Court, prevent this defendant, your orator, from fishing or operating his said set nets, for the purpose of catching salmon fish; and that the plaintiff will, unless restrained by the order of this Court, exercise the exclusive right of fishery at the place where defendant's, your orator's, said set nets were situated at the time of the commencement of this action, and will, unless restrained by the order of this Court, prevent this defendant, your orator, from ever fishing or operating, for the purpose of catching salmon fish, said set nets, or any or either of them.

## 23.

That this defendant does not have a plain, speedy or adequate remedy at law for the redress of the grievances herein complained of by this defendant, your orator.

## 24.

That an emergency exists and this defendant, your orator, is entitled to a permanent injunction forever enjoining plaintiff from maintaining or operating said seines or any or either of them on the lateral location and end passageway of any of defendant's, your orator's, said set nets, and from interfering with this defendant's, your orator's, right to fish and operate defendant's, your orator's, said set nets.

WHEREFORE, your orator to the end, that he may obtain relief to which he is justly entitled in the



premises, prays [83] the Court to grant him, a judgment and decree as follows:

1.

That the Court grant to him a writ of subpoena, directed to the said Columbia River Packers' Association, complainant in the above-entitled action, requiring and commanding it to appear herein and answer under oath, to the several allegations in this cross-bill contained.

2.

That complainant be required to set forth any and every adverse interest, claim or demand, in or to the said premises, and upon which your orator's set nets were located at the time of the commencement of the above-entitled action, to the end, that said adverse interest, claim or demand may be justly adjudicated and declared null and void as against this cross-complainant, and your orator; and that the exclusive right to fish and operate your orator's said set nets, on the locations where the same were at the time of the commencement of this action, be established in your orator and confirmed in your orator, as against any and all claims of the said Columbia River Packers' Association.

3.

That your Honors grant unto your orator, this cross-complainant, further judgment and decree as follows:

That this Court decree that an emergency exists in this case and that a preliminary injunction be issued herein, enjoining and restraining the Columbia River Packers' Association, the complainant in the

above-entitled action, and its servants, agents, employees and all persons acting by, through, or under it, from fishing, on the locations of your orator's said set nets, in the Columbia River, in Pacific County, Washington, and from [84] fishing for salmon fish on the locations of said set nets or any or either of them; and from interfering with this defendant in the maintenance and operation of his said set nets; and that upon the final hearing herein that your Honors grant unto your orators a writ of injunction, forever and perpetually enjoining and restraining the Columbia River Packers' Association, its agents, servants, officers and employees, and all persons acting under, or through it, from in any manner interfering with your orator in the operation of your orator's said set nets, and from maintaining operating or fishing for the purpose of catching salmon fish, in any fishing appliances whatever, upon or over the locations of your orator's said set nets in the waters of the Columbia River, and from interfering with the operation of your orator's said set nets, or any or either of them.

31½.

That your orator have a judgment against plaintiff and complainant in the sum of \$20,000.00.

4.

That your orator have such other, and further judgment and decree and relief in the premises as to the honorable Court may seem equitable and just, and for his costs and disbursements herein; and that your orator may have such other or further relief in the

premises as the nature of the circumstances in the case may require.

WELSH, WELSH & O'PIELAN,  
Solicitor, Counselor and Attorney for Cross-com-  
plainant, and Your Orator, H. S. McGowan,  
Residence and Address, South Bend, Washing-  
ton.

H. S. McGOWAN,  
Your Orator. [85]

State of Washington,  
County of Pacific,—ss.

I, H. S. McGowan, being first duly sworn, upon my oath do depose and say:

That I am the cross-complainant and your orator named in the above and foregoing cross-bill and complaint; that I have read the same and know the contents thereof and the same and the whole thereof is true, as I verily believe, and I have signed the said verification.

H. S. McGOWAN.

Subscribed in my presence and sworn to before me this 26th day of August, A. D. 1908.

[Seal]

JOHN T. WELSH,  
Notary Public for the State of Washington Residing  
at South Bend in Said State.

Filed U. S. Circuit Court, Western District of  
Washington. Aug. 28, 1908. A. Reeves Ayres,  
Clerk. ———, Deputy. [86]

*In the Circuit Court of the United States for the  
Western District of Washington, Western Divi-  
sion.*

COLUMBIA RIVER PACKERS' ASSOCIA-  
TION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and L. N.  
STENSLAND,

Defendants.

**Demurrer of Plaintiff to Cross-complaint of  
Defendant McGowan.**

The demurrer of Columbia River Packers' Association, plaintiff, to the alleged cross-bill of defendant H. S. McGowan, one of the above-named defendants.

This plaintiff, by protestation, not confessing all or any of the matters and things in the said defendant's alleged cross-bill contained to be true in such manner and form as the same therein set forth and alleged, doth demur to said alleged cross-bill and for cause of demurrer sheweth to the Court,

First: That this honorable Court hath no jurisdiction to entertain said alleged and pretended cross-bill, as a cross-bill, for that it is not the beginning of an independent suit, neither is it pleaded as a defense to plaintiff's cause of suit;

Second: That said alleged cross-bill doth not con-



tain any matter of equity whereon this Court can ground any decree or give to the said defendant any relief against this plaintiff;

Third: That as to all matters and things set forth in said alleged and pretended cross-bill, the said defendant hath right to plead and has pleaded the same in his separate answer to the original bill filed herein.

WHEREFORE and for divers and other good causes of [87] demurrer appearing in the said alleged cross-bill, plaintiff doth demur thereto, and humbly demands the judgment of this Court whether it shall be compelled to make any further or other answer thereto and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

G. C. FULTON,  
Solicitor for Plaintiff.

State of Oregon,  
County of Clatsop,—ss.

I, G. C. Fulton, being first duly sworn, on oath depose and say that on September 2, 1908, I caused to be deposited in the United States postoffice, at Astoria, inclosed in an envelope duly stamped addressed to Messrs. Welsh, Welsh and O'Phelan, Attorneys at Law, South Bend, Washington, being the attorneys for defendants, a true, full and correct copy of the within and foregoing demurrer.

G. C. FULTON.

Subscribed and sworn to before this 2d day of September, 1908.

[Notarial Seal]

W. M. VAN DUSEN,  
Notary Public for Oregon.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Sep. 9, 1908. A. Reeves Ayres, Clerk. —————, Deputy. [88]

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*In the United States Circuit Court for the Western District of Washington, Western Division.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSY and L. N. STENSLAND,

Defendants.

**Order [or Decree Overruling Plaintiff's Demurrer to Cross-complaint].**

Now on this date the above-entitled cause was brought on for hearing before the Court upon the separate demurrers of the plaintiff to the separate cross-bills and complaints of each of the defendants H. S. McGowan, Erick Lindstrom, and J. P. Coyle; the plaintiff appearing by its attorney G. C. Fulton, Esq., and the defendants by their attorneys Messrs. Welsh & O'Phelan, and the Court, after listening to the arguments of their respective counsel, and being fully advised in the premises, overrules each of said demurrers.

IT IS THEREFORE CONSIDERED, ORDERED AND DECREED by the Court that the

demurrers of the plaintiff to the cross-bills and complaint of the defendant J. P. Coyle, and the demurrer of the plaintiff to the cross-bill and complaint of defendant H. S. McGowan, and the demurrer of the plaintiff to the cross-bill and complaint of Erik Lindstrom, be, and they are hereby and each of them is, overruled.

IT IS FURTHER ORDERED that the plaintiff be, and it is hereby allowed twenty (20) days in which to answer to each of said cross-bills.

Dated this 21st day of October, A. D. 1908. [89]

C. H. HANFORD,  
Judge.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Oct. 21, 1908. A. Reeves Ayres, Clerk. ———, Deputy. [90]

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*In the Circuit Court of the United States for the  
Western District of Washington, Western Division.*

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and L. N.  
STENSLAND,

Defendants.

**Answer of Plaintiff to Cross-complaint of Defendant  
McGowan.**

Comes now the above-named plaintiff and now and

at all times hereinafter saving to itself all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the defendant, H. S. McGowan's cross-bill and complaint, filed herein in the above-entitled action, and for answer thereto admits, alleges, and denies as follows, that is to say,

I.

This plaintiff answering unto paragraph No. 3 of said cross-bill and complaint admits that the said H. S. McGowan applied to the Fish Commissioner of the State of Washington for licenses to operate three set nets in the waters of the Columbia River, but denies that the said H. S. McGowan, on the 15th of April, 1908, or at any other time whatever, or at all, or pursuant to the laws, or any law, of the State of Washington applied to such commissioner for licenses to operate or fish for salmon fish, or any fish, three set nets, or any set nets, in Pacific County, Washington, at the places, or any place, where said alleged or any set nets, or any set net, was located at the time of the commencement of this action, or elsewhere; and denies that said application covers any [91] particular locality or place or any county. This plaintiff does not deny that said McGowan obtained three licenses to operate two separate set nets and numbered respectively 1431, 1432; but denies that said licenses authorized him to operate the same or either in any particular river or any particular water or confined the same to the Columbia River, but the same were and each was a roving license.



## II.

This plaintiff answering unto paragraph No. 4 of said cross-bill and complaint denies that, under and pursuant to said licenses, or any license whatever, or under the laws or any law of the State of Washington, the defendant H. S. McGowan did on or about the 16th of June, 1908, or at any other time whatever, cause the or any location for said alleged set nets, or set net, to be made by securely, or at all, fastening a buoy on the location, or on any location, or for each or any set net, or upon which he posted or caused to be posted the number of the license, or any license, or any number under which the said alleged respective set nets, or either, was operated, or numbered 1431, or 1432, or either thereof or any number, excepting plaintiff admits that said defendant Coyle did place certain obstructions in the waters of the Columbia River immediately in front of said Sites No. 2 and 3 mentioned in plaintiff's complaint, which he called set net locations and falsely represented them to be set net locations, and they are the same obstructions complained of in plaintiff's complaint.

## III.

This plaintiff answering unto paragraph No. 5, alleges that it has no knowledge or information sufficient to form a belief as to whether or not the point or place in the waters of the [92] Columbia River in Pacific County where said defendant alleges that on the 16th of June, 1908, he located the said alleged set nets, or either, or under license No. 1432, was located accordingly as in said paragraph described, for that plaintiff is not familiar with the description

of the location as described but alleges that the alleged and pretended set net, set forth and described therein, is one of the obstructions complained of in plaintiff's complaint. This plaintiff also alleges that it has no knowledge or information sufficient to form a belief as to whether or not the description of the exact location of the alleged and pretended set nets under said alleged licenses No. 1431 and 1432 is correct, but avers that the same were located in front of said premises described in plaintiff's complaint and was and is one of the obstructions complained of in plaintiff's complaint. Plaintiff also admits that the point where each of said alleged and pretended set nets are located are below the line of ordinary low water, but denies the same, or either, are beyond the line of extreme low water of the Columbia River; and denies that the same were between the line of extreme low water and the adjacent channel of said Columbia River; and alleges that the same are within the channel of said river, that is the said river is navigable at the point where said alleged and pretended set nets, described in said cross-bill and complaint of H. S. McGowan, are located and were located at the beginning of this action; and denies that the same are beyond Sand Island, but admits the same are in front of said Sand Island; and denies that either of said alleged set nets, or the location thereof, was being fished or operated by defendant H. S. McGowan for the purpose of catching salmon fish or under any license number, or otherwise, than in violation of law and the rights of plaintiff herein; and denies that the Fish Commissioner of the State

of Washington had any right or authority to grant such defendant any right to construct, operate, or maintain either of said alleged and [93] pretended set nets in front of said Sites No. 2 and 3 aforesaid. This plaintiff further denies that on the 16th of June, 1908, or at any other time or at all, said defendant caused the location of said alleged and pretended set net No. 1431 or 1432 or either to be made by securely anchoring a buoy in the waters of said river, or otherwise, or on the location set forth in said answer, or upon which he at the said time, or at all, placed or posted or caused to be posted a number of said alleged licenses, but admits that said defendant did before the first day of July, 1908, prior to the institution of this action, cause certain buoys to be securely anchored in the waters of said river in front of Sites No. 2 and 3, described in plaintiff's complaint, upon which certain numbers were posted, and plaintiff is informed said buoys were numbered 1431 and 1432, and that the placing of said buoys which said defendant wrongfully calls set nets are some of the obstructions complained of in plaintiff's complaint; and this plaintiff further admits that there was attached to each of said alleged and pretended set nets a large stone weighing at least 300 pounds to which was attached rope, wire, and chain; and plaintiff alleges that the same were so firmly anchored and secured that it was impossible to operate any other fishing device in said waters.

#### IV.

This plaintiff answering unto paragraph No. 6 of said cross-bill and complaint says that it is not true



and denies that said licenses, or either of them or any of them, duly authorized or empowered, or authorizes or empowers defendant to fish or operate said alleged set nets, or either thereof, on said alleged respective locations, or upon any part or portion of the waters or bed of the Columbia River in front of said Sites No. 2 and 3 or between the line of low-water mark and the navigable channel [94] of said river at any time whatever, or at all, or during the entire or any portion of the fishing season of 1908, or any other time whatever, or for the purpose of catching salmon or other fish, or for any purpose whatsoever; and denies that said defendant since or about the 16th of June, 1908, or at any other time whatever, or at all, has fished or operated each or either of said alleged set nets or any set net in front of said Sites 2 and 3 aforesaid for the purpose of catching salmon fish at either of said locations aforesaid until interfered with by plaintiff, or until enjoined by the order of this Court in this proceeding, but on the contrary this plaintiff avers that said alleged set nets were placed by defendant in front of said Sites 2 and 3, described in plaintiff's complaint for the sole purpose of harassing and annoying this plaintiff and preventing plaintiff from operating same on said Sand Island on said sites, and for no other purpose whatever.

V.

This plaintiff, answering unto paragraph No. 7 of said cross-bill and complaint of said defendant H. S. McGowan, denies that each or either of said set nets was constructed by means of ropes or twine or cord



or lead, or that the meshes of each or either of said alleged set nets was more than three inches, stretch measure; and denies that either of said alleged set nets as described in said answer was intended as a set net or fished as such, but admits that each was secured firmly so that it remained as located in said Columbia River until removed by this plaintiff and enjoined by this Court; and denies that any fish were ever caught in either of said set nets, or that they were operated so as to catch any fish.

## VI.

This plaintiff answering unto paragraph No. 8 of said [95] cross-bill and complaint denies that ever since the 16th of June, 1908, or at any time whatever, or at all, this defendant maintained his said locations, or either thereof, or of his said alleged set nets or either thereof, or maintained or operated or fished either thereof for the purpose of catching salmon fish, or otherwise, or at all, or until interfered with by plaintiff or until enjoined by the order of this Court, but admits that said alleged set nets as described in plaintiff's complaint were kept and maintained in front of said Sites No. 2 and 3 on said Sand Island as alleged in plaintiff's complaint until removed and further maintenance enjoined by this Court. This plaintiff further denies that said alleged set nets, or either thereof, or each or any of them, caught any fish or any fish were caught therein, or in either thereof in any manner whatever, or in the manner alleged in the said alleged cross-bill and complaint; and denies that any fish would now be caught in any of said set nets, or either of them or

each thereof, in any manner whatever should said defendant be permitted to operate same or either thereof; and denies that fish were or could be caught in either of said set nets or in each of them or in any of them by entangling themselves in any of the set nets or either thereof, or become fast therein, for that the buoys and anchors were utterly incapable of catching any fish and fish could not become entangled in the buoys or the wires or chains or the anchors, and the alleged web attached to said alleged set nets was old and worn and rotten and was only attached at one end leaving it swinging with the winds and tides. Plaintiff admits that if any fish could, by any possible chance, be caught in such contrivances they could very readily be taken out by men in small boats afloat on the water, providing it was high tide but could not be so removed at low tide. [96]

## VII.

This plaintiff, answering unto paragraph No. 9 of said cross-bill and complaint, denies that said defendant was or is entitled to a lateral passageway or any passageway of at least 300 feet or any feet whatever, or any lateral passage or an end passageway of 30 feet or any end passageway, or any passageway or at all, or between each of his said alleged set nets or elsewhere, or otherwise, or at all, or any other fishing appliances or any fishing appliances placed on said river, or to be placed therein; and denies that it is a crime under the laws or any law or statutes or any statute of the State of Washington or punishable under said alleged or any law for any person to construct or own or operate any appliance for the

purpose of catching fish or salmon fish or any fish, in said waters, or elsewhere, without leaving for defendant's said alleged set nets, or either thereof or each of them, or either of them an end passageway or any passageway of at least 30 feet or any distance whatever, or a lateral passage of at least 300 feet, or any distance, for that the said defendant had no right or authority to enter upon or into said premises to construct or operate said alleged set nets, or either thereof.

### VIII.

This plaintiff answering unto paragraph No. 10 of said cross-bill and complaint denies that the defendant, prior to the institution of this action, expended large sums or any sum of money in acquiring the rights, or any right, of fishing or operating said alleged set nets, or each of them or either thereof, but admits that the right of fishing at that said point and in front of said Sites 2 and 3 aforesaid was of great value and profit; and denies that the or any rights acquired by the defendant therein were or was of any value whatever to defendant, [97] for that he acquired nothing; and denies that the said defendant was on June 16th, 1908, or at any time, or at all, or at all times or at any time, until enjoined by this Court, engaged in operating his said alleged set nets or either thereof or each of them for any purpose or for the purpose of catching salmon fish therein, or otherwise, or for sale in the market or otherwise, or that defendant has derived or expects to derive large or any profits from said alleged set nets or either thereof; and denies that either of said



alleged set nets is of much or of any value by reason of the salmon fish caught, or to be caught therein.

IX.

This plaintiff, answering unto paragraph No. 11 of said cross-bill and complaint, denies that, at the same place or location where defendant's alleged set nets or each of them or either thereof was located or fished or operated as alleged from the 16th of June, 1908, or at any time or until enjoined by this Court in this proceeding, said alleged locations or either or each of them was fished or operated for the purpose of catching salmon fish during the fishing season of the year 1902, or during the fishing seasons of each and every or each or every or any year or time since said year up to or including the year 1907 by the defendant's alleged, or any predecessor or predecessors in interest; and denies that defendant's alleged predecessors or any predecessors in interest of defendant fished or operated either of said locations by set nets or otherwise for the purpose of catching salmon fish or other fish with fishing appliances, or otherwise, or any appliance authorized by the laws of the State of Washington or any licenses issued by the Fish Commissioner of the State of Washington; and denies that said [98] defendant, in the manner provided by law, or otherwise, purchased said alleged or any interest in said alleged locations or either thereof; and denies that under said or any licenses issued to said defendant by the Fish Commissioner of the State of Washington defendant had located or was operating or occupying or fishing with his alleged two set nets, or either thereof for salmon fish,



or otherwise, his said alleged locations or either of them, or of his said alleged locations of his said alleged set nets, or either thereof a long time prior, or at any time prior to the time that plaintiff attempted to secure or locate thereon, or at any time whatever, or long prior or at any time prior to the time that plaintiff commenced fishing on said alleged locations or either thereof or at any other time whatever or at the time plaintiff commenced fishing operations with its drag seines. This plaintiff admits that it did not begin actual fishing operations on its said premises until about the 2d or 3d of July, 1908; and denies that it was required to secure any additional fishing location, being the owner of said premises; and denies that, under the laws or any law of the State of Washington or otherwise, defendant is or was entitled to the sole, prior, and exclusive or sole, prior or exclusive right or any right to the alleged locations, or either thereof, which were occupied by defendant's said alleged set nets, or either thereof, at the commencement of this action, or was then or is now or ever was entitled to the sole, prior and exclusive, or the sole, prior, or exclusive or any right to fish on said locations or either thereof for salmon fish or for any fish whatever, or with his said alleged or any set nets or any set net during the fishing season of this or future years of any time whatever, or at all. On the contrary plaintiff alleges that it has the exclusive right [99] to drag seines over and across the premises now occupied by the obstructions placed in front of said Sites 2 and 3 by the defendant herein which defendant calls set nets,

and the acts of said defendant in placing said buoys and anchors and the placing of said alleged set nets in front of said Sites 2 and 3 were and are the trespasses and continuing trespasses complained of in plaintiff's complaint.

X.

This plaintiff answering unto paragraph No. 12 of said cross-bill and complaint denies that, at the commencement of this action or at any time or ever since the 16th of June, 1908, or at any time whatever or at all, defendant was fishing or operating said alleged or any set nets or any set net in the usual way or in any way whatever, or in the only manner in which they or either could be fished or operated for the purpose of catching salmon fish, or otherwise or at all, or was in no way or in no manner interfering with the Sites No. 2 or 3, as alleged in plaintiff's complaint, but avers that said obstructions which defendant calls set nets are and were at the institution of this action obstructions to the navigation of said waters and absolutely prevented seining operations on said Sites 2 and 3 and each thereof. Plaintiff admits that if said alleged set nets are operated as set nets for the purpose of catching salmon fish same would be fished and operated entirely from boats on the waters of said river, providing the same were attended to at high water, but at low water the points where said obstructions are located are not susceptible to navigation; and plaintiff admits that it is not necessary to go or trespass upon the high land of said sites aforesaid, but denies that if defendant is permitted to fish or operate set nets attached

[100] to said buoys or obstructions defendant does not intend to and denies that it is not necessary to trespass or to go upon or over said Sites 2 and 3 or any part thereof; and denies that said sites or either thereof do not extend beyond low water in the waters of the Columbia River, but alleges that the same extend to and beyond the line of low-water mark and beyond the point where said obstructions are and were located; and furthermore plaintiff is entitled to the free and unobstructed ingress to and egress from said sites which said obstructions prevent and interfere with as alleged in plaintiff's complaint.

### XI.

This plaintiff answering unto paragraph No. 13 of said cross-bill and complaint denies that said alleged set nets or either thereof, as located or fished by defendant, did not, and denies that if this Court permits them or either to be fished or operated, will not interfere with the navigation of said river for the purpose of trade or commerce or for any other purpose or for which the navigation of said river is used or can be used. This plaintiff denies that neither of said set nets extends to the channel of said river, but admits that the water at the place of the location of each thereof does not exceed six feet in depth at low tide, and avers that the depth of the water at said buoys at low tide does not exceed one foot.

### XII.

This plaintiff answering unto paragraph No. 14 of said cross-bill and complaint denies that each or either of defendant's said alleged set nets or the obstruction complained of or the alleged exclusive



right to fish the same or otherwise or either is or were or are of the reasonable value of \$10,000.00 or any sum or amount whatever; and denies that said alleged set nets or either [101] thereof or each of them or any of them catch a great many or any valuable or any salmon fish; and denies that if defendant is permitted to fish or operate them or either, they or either would catch a great many or any valuable or any salmon fish, or amount to many thousand dollars' worth, or of any value whatever; and denies that the exact amount or value of the fish that could be caught in said alleged set nets as operated by defendant cannot be or is impossible to determine. Plaintiff admits that salmon are of great merchantable value; but denies that during the fishing seasons or either thereof of the year 1908 or at any time or future years, or at any time, defendant, if permitted to operate said alleged or either of said alleged set nets, will catch therein many valuable or any salmon fish or great or of any value or worth many thousand dollars, or any sum or amount whatever; and denies that the exact amount of salmon fish or the value of salmon fish that the defendant would catch in the said alleged set nets or either thereof cannot be estimated or computed, but avers that the same could not catch any fish whatever and were not constructed for that purpose and neither were operated for such purpose.

### XIII.

This plaintiff answering unto paragraph No. 15 of said cross-bill and complaint denies that neither of said defendant's said alleged set nets or any part



thereof was at any time an obstruction to the navigation of said Columbia River, but on the contrary alleges that each was an obstruction to the navigation of said river; and denies that if defendant is permitted to operate said set nets or either thereof at the place or location where same were, at the time of the commencement of this action, the same will not constitute or be an obstruction in or to the navigation of the Columbia River or to the navigable waters of said river; and denies that no part of said buoys or either thereof [102] which mark the locations thereof or either thereof were not at any time an obstruction in or to the navigation of said Columbia River, but avers that each thereof was and is an obstruction to such navigation; and denies that neither thereof was in the navigable portions of said river, but admits that the point where each was located the water does not exceed in depth at low tide six feet and avers that at low tide the depth of the water at said point was about one foot but same constituted a portion of the channel of said river; and denies that neither thereof extended out to the channel of said river or to the part of the river used by boats or vessels plying the waters of said river for the purpose of trade or commerce.

#### XIV.

This plaintiff answering unto paragraph No. 16 of said cross-bill and complaint denies that neither of said set nets or any part thereof was upon any part of said Sites No. 2 and 3, or any part thereof, but avers that each were upon said two sites aforesaid; and denies that the place where said obstructions and

buoys were located were not upon said sites, but alleged that each were upon said sites; and denies that the said alleged set nets or either thereof, or the operating or the fishing of the same or either thereof did not interfere with or prevent plaintiff from ingress to or egress from said Sites No. 2 or 3 of said Sand Island, mentioned in plaintiff's complaint, but avers that each thereof did interfere with and prevent the free ingress to and egress from such sites; and denies that if defendant is permitted to operate said alleged set nets, or either thereof, at the place where same were or either was located at the commencement of this action neither will interfere with or prevent plaintiff's free ingress to or egress from Sand Island, but avers [103] that same will interfere and obstruct the free ingress to and egress from said Sites 2 and 3 as set forth and alleged in plaintiff's complaint.

#### XV.

This plaintiff, answering unto paragraph No. 17 of said cross-bill and complaint, denies that said defendant intends to or will fish or operate for salmon fish, or otherwise, said alleged set nets or either thereof at the same place or any place, or location where same are or either was located on or about the 16th of June, 1908, or at any time if permitted by the Court, or unless restrained by this Court upon final hearing, but avers that said obstructions were not intended as set nets but were intended simply to harass and annoy this plaintiff and prohibit plaintiff from operating seines upon the shore of said Sand Island; and denies that the said alleged set nets

or either thereof, set forth in said answer, are or were the things which the plaintiff alleges in its complaint constitute an obstruction to the navigation of said river, or are the things or thing which plaintiff in its complaint complains. But in this regard plaintiff alleges that the things complained of in its complaint were and are designated in said defendant's answer as set nets.

## XVI.

This plaintiff answering unto paragraph No. 18 of said cross-bill and complaint of said defendant H. S. McGowan denies that while defendant was operating or fishing for salmon or any fish his said alleged set nets, or either thereof or each of them or any of them, at the location or place where the same were located in the waters of the Columbia River or in Pacific County or in the State of Washington, or otherwise or elsewhere, or on or about the 2d or 3d of July, 1908, or at any time or at any other [104] date or dates or time or times since said date, this plaintiff, or its agent or agents or its officer or officers or servant or servants, unlawfully or wrongfully, or otherwise or at all, or without the consent of defendant or at all, entered upon the lateral passageway or location or upon the end passageway or the location of the defendant's said alleged set nets of each of them or either thereof, or upon or over the location of said alleged set nets or each of them or either thereof, or then or there or otherwise or at all unlawfully or wrongfully or without the consent of defendant, or otherwise or at all, with any drag seine or seines, or otherwise or at all, did fish



with said or any drag seines for the purpose of catching salmon fish in said seine or seines on the location of defendant's alleged set nets or set net or each of them or either thereof, or did catch salmon fish therein which otherwise would have been caught in the said alleged set nets, or each of them or either thereof, or has ever since said time, or at all, wrongfully or unlawfully or without the consent of defendant, or otherwise, daily or at all fished for the purpose of catching salmon fish or otherwise with its said drag seine or seines upon the lateral passageway or the location or upon the end passageway or location of defendant's said alleged set nets or each of them or either thereof, or upon or over the said alleged set nets or each of them or either thereof, or is now catching salmon fish in its drag seine or seines which would otherwise be caught in defendant's alleged set nets or each of them or either thereof, or upon or over the said set nets or either of them or each thereof, or is now catching salmon fish in its drag seine or seines which would otherwise be caught in defendant's alleged set nets or each of them or either thereof were defendant permitted to operate the same or either thereof. [105]

But this plaintiff alleges that prior to the institution of this action it did enter upon its said property rights, namely said Sites 2 and 3, and did operate drag seines in front thereof and over the territory and locations claimed by the defendant herein as set net locations, and that it did so without the consent and against the protest of said defendant accordingly as plaintiff has alleged in its said complaint. This plaintiff denies, however, that thereby or otherwise



or at all the defendant is irreparably or at all damaging or injuring the defendant, or that the damages or any damage will amount to many thousands of dollars or to any sum or amount whatever; and denies that it is impossible to measure such alleged or any damage in money, or otherwise. This plaintiff admits that it is impossible to say how many fish plaintiff would or will catch in its drag seines, or how many fish it will daily catch therein before the seines are operated; but denies that it is impossible to say how many salmon fish the defendant would catch in his said alleged set nets or either thereof if permitted to operate the same, for that accordingly as the same were constructed and operated by said defendant no fish would be caught therein.

#### XVII.

This plaintiff answering unto paragraph No. 19 and 20 of said cross-bill and complaint admits that it will continue, during the fishing seasons on the Columbia River, to daily fish for salmon fish and in front of said Sites 2 and 3 and over the territory claimed by the defendant as his set net locations so long as it has the right so to do from the owner of said Sand Island, namely the United States; but denies that said defendant has any set net location or right to have any set net location, or has any lateral passageway or end passageway to any set net location, or that [106] the defendant ever operated a set net thereon; and admits that this plaintiff claims the exclusive right to draw seines on and over the frontage to said Sites 2 and 3 on Sand Island; and denies that the defendant has any right to construct

or operate any fixed appliance or stationary obstruction in front thereof, but accedes the right in the defendant or in the public to use floating appliances for the purpose of catching salmon fish in any of the waters of said river; but denies that in the operation of said drag seines plaintiff has trespassed upon any right of the defendant; admits that this plaintiff will prevent the defendant, in so far as it can, without violating the law, from placing stationary appliances or structures or any fixtures in front of said Sites 2 and 3 that will, in any manner, prevent or interfere with the free ingress to and egress therefrom, or from the operation of drag seines in front thereof; but denies that the said defendant will thereby, or otherwise, be irreparably or at all damaged or that the damage to the defendant or any damage to defendant will amount to many thousands of dollars or any sum or amount, and denies that it is impossible to measure such alleged damage or damages; denies that it is impossible to ascertain how many fish defendant would catch in his said alleged set nets during the fishing season of this year or at any time, for that the same will not catch any fish accordingly as operated by defendant.

#### XVIII.

This plaintiff answering unto paragraph No. 21 of said cross-bill and complaint of said defendant H. S. McGowan, says that it is true and admits that on the 3d day of July, 1908, plaintiff endeavored to prevent and is now endeavoring to prevent defendant from operating his said alleged set nets where the same are located in front of said Sites 2 and 3,

and where the same [107] interfere with and obstruct the free ingress to and egress therefrom. This plaintiff denies that it claims the exclusive right of fishery in the Columbia River, but claims it has the exclusive right to operate drag seines in front of said Sites 2 and 3 and that no one has the right to prevent plaintiff from so doing by any obstruction placed in said waters in front thereof; and that plaintiff has, at all times, denied that defendant has any right to place in said waters in front of said sites at the place where defendant constructed the same the alleged set nets, described in said cross-bill and complaint.

### XIX.

This plaintiff answering unto paragraph No. 22 of said cross-bill and complaint says that it is true and admits that it will, unless restrained by this Court, continue daily during the salmon fishing season only, to fish and operate its said drag seines upon and in front of said Sites 2 and 3 accordingly as alleged in its said complaint; but denies that the operation of the same will be upon the lateral location or end passageway of any set nets owned by defendant. This plaintiff also admits that it denies that defendant has any right to construct or operate any fixed appliance in front of said sites.

### XX.

This plaintiff answering unto paragraph No. 21½ of said cross-bill and complaint denies that because said defendant has been enjoined in this suit or prevented from fishing for the purpose of catching salmon fish, or otherwise, each or all or any of his



said alleged set nets at the location or locations in said cross-bill and complaint mentioned, has been damaged in the sum of many thousand dollars or in any sum or amount or damaged at all; [108] denies that it is impossible to allege or state specifically the exact amount of money in which said defendant has been damaged; and denies that defendant has been damaged in any sum or amount; or that he has been damaged in the sum of at least \$20,000.00 or in any sum or amount up to the present time, or at all; and denies that defendant has been damaged in any sum or amount whatever.

#### XXI.

This plaintiff answering unto paragraphs No. 23 and 24 of said cross-bill and complaint denies that defendant does not have a plain, speedy, or adequate remedy at law for the redress of the alleged grievances, or at all; and denies that an emergency exists; and denies that defendant is entitled to a permanent or any injunction forever or at all enjoining plaintiff from maintaining or operating said seines or any or either of them on the alleged lateral location or alleged end passageway of any of defendant's alleged set nets, or from interfering with defendant's right to fish or operate defendant's said alleged set nets, or either thereof.

#### XXII.

This plaintiff further answering unto the said cross-bill and complaint of defendant denies all and all manner of unlawful combination and confederacy wherewith it is by said alleged cross-bill and complaint charged; without this there is no other mat-



ter, cause, or thing in said defendant's cross-bill and complaint contained, material, or necessary for this plaintiff to make answer to, and not herein and hereby well and sufficiently answered to, and confessed, traversed, and avoided or denied is true to the knowledge or belief of this plaintiff all of which matters and things this plaintiff is ready and [109] willing to aver, maintain, and prove as this honorable Court shall direct; and humbly prays to be hence dismissed as to the pretended cross-bill and complaint of this defendant, with its reasonable costs and charges in its behalf most wrongfully sustained; and for such other and further relief in the premises as to this honorable Court may seem meet and in accordance with equity.

G. C. FULTON,

Solicitor for Complainant. [110]

State of Oregon,

County of Clatsop,—ss.

I, Samuel Elmore, being first duly sworn, depose and say: That I am vice-president of complainant in the above-entitled action; and that the foregoing answer is true, as I verily believe.

[Seal]

SAMUEL ELMORE.

Subscribed and sworn to before me this 26th day of October, 1908.

G. C. FULTON,

Notary Public for Oregon.

State of Oregon,

County of Clatsop,—ss.

I, G. C. Fulton, being first duly sworn on oath depose and say: That on October 27, 1908, I delivered to

Messrs. Welsh, Welsh and O'Phelan, attorneys for the defendants herein, a true, full and correct copy of the foregoing answer by depositing the same in the United States postoffice at Astoria, Oregon, inclosed in a sealed envelope, postage prepaid, addressed to said attorneys at South Bend, Washington.

[Seal]

G. C. FULTON.

Subscribed and sworn to before me this 29th day of October, 1908.

W. M. VAN DUSEN,  
Notary Public for Oregon.

Filed U. S. Circuit Court, Western District of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. ————, Deputy. [111]

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**[Replication of H. S. McGowan to Answer to Crossbill and Complaint.]**

*In the Circuit Court of the United States for the Western District of Washington, Western Division.*

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and L. N. STENSLAND,

Defendants.

H. S. MCGOWAN'S REPLICATION TO THE  
ANSWER WHICH THE PLAINTIFF HAS  
FILED TO THE CROSS-BILL AND COM-  
PLAINT OF H. S. MCGOWAN.

*To* replication of H. S. McGowan to the answer which plaintiff has filed to the cross-bill and complaint of H. S. McGowan.

This replicant, H. S. McGowan, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the Columbia River Packers' Association, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said Columbia River Packers' Association, and that the answer of the said Columbia River Packers' Association is very uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove, as this honorable Court shall direct and humbly prays as in and by his said cross-bill he hath already prayed.

WELSH, WELSH & O'PHELAN,  
Solicitors for Defendant, H. S. McGowan. [112]

State of Washington,  
County of Pacific,—ss.

I, H. S. McGowan, being first duly sworn, upon my oath do depose and say: That I am one of the defendants in the above-entitled action, and one of the cross-complainants therein. That I have read the above and foregoing replication and know the contents thereof, and that the same and the whole thereof is true as I verily believe.

H. S. McGOWAN.

Subscribed and sworn to before me this 18th day of December, A. D. 1908.

[Notarial Seal]

GEO. HIBBERT,

Notary Public for the State of Washington, Residing  
at Chinook, in Said State. [113]

*In the Circuit Court of the United States for the  
Western District of Washington, Western Division.*

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and L. N.  
STENSLAND,

Defendants.

AFFIDAVIT.

State of Washington,  
County of Pacific,—ss.

I, John T. Welsh, being first duly sworn upon my oath depose and say: That I am one of the attorneys



and solicitors for the defendant and cross-complainant H. S. McGowan in the above-entitled action.

That my place of residence and address is South Bend, Pacific County, Washington.

That G. C. Fulton is the attorney of record for the Columbia River Packers' Association, the plaintiff in the above-entitled action, and the place of residence and address and the office of said G. C. Fulton is Astoria, Clatsop County, State of Oregon.

That on the 24th day of December, A. D. 1908, I put in an envelope a true and correct copy of the foregoing attached replication in the above-entitled action and proceeding and then I sealed said envelope and prepaid the United States postage thereon in advance and then I wrote the following name and address on said envelope, namely: G. C. Fulton, Attorney at Law, Astoria, Clatsop County, Oregon, and then on said 24th [114] day of December, 1908, I deposited said envelope and its contents in the United States postoffice at South Bend, Washington.

That there is a daily communication of the United States mails to, from and between said South Bend, Washington, and said Astoria, Oregon, and that there is a United States postoffice at each of said places.

JOHN T. WELSH.

Subscribed and sworn to before me this 24 day of December, A. D. 1908.

[Notarial Seal]

SOL. SMITH,

Notary Public for the State of Washington, Residing at South Bend in Said State.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Dec. 26, 1908. A. Reeves Ayres, Clerk. —————, Deputy. [115]

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**[Stipulation for Omission from Transcript on Appeal of Original Bill, Pleadings of Defendants Lindstrom and Coyle, etc.]**

*In the District Court of the United States for the Western District of Washington, Southern Division.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Complainant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,

Defendants.

IT IS HEREBY stipulated and agreed by and between the respective parties in the above-entitled cause that for the purpose of shortening the transcript on appeal, the pleadings filed in this cause on behalf of defendants, Erick Lindstrom and J. P. Coyle, and the pleadings of the plaintiff directed against the same, may be omitted for the reason that said pleadings are, in all respects, identical with the pleadings filed herein on behalf of defendant H. S. McGowan and with those filed by plaintiff directed against the pleadings of H. S. McGowan, save and except only that the approximate descriptions, loca-

tions and license numbers of defendants Lindstrom and Coyle are separately referred to and described in their said pleadings, said set net locations of defendant Lindstrom being numbered 1433, 1434 and 1435; and those of defendant Coyle being numbered 1436, 1437 and 1438, and located in the Columbia River off the southerly side of Sand Island below the line of ordinary low tide and above or to the northward of the Government's fairway or channel line whereat it is claimed by defendants fishing may be carried on with fixed appliances without special Government permits. [116]

Said fishery locations are further described as lying immediately to the southward below and in front of the low tide line which as claimed by defendants is the south boundary line of Government Sites numbered 2 and 3 lying along the shore of said Sand Island.

And for the purposes and uses of said record, the pleadings of defendant H. S. McGowan and the pleadings of plaintiff directed against the same shall be deemed also to be the pleadings of defendants Lindstrom and Coyle and the pleadings of the plaintiff directed against the same, subject only to variations as to license numbers and descriptions, as aforesaid.

IT IS FURTHER stipulated that the original bill in equity may be omitted from the transcript for the reason that an amended bill was filed.

Dated this 3d day of December, A. D. 1913.

G. C. FULTON,

Attorney for Plaintiff.

WELSH & WELSH,

DORR & HADLEY,

Attorneys for Defendants.

[Endorsed]: Filed in the U. S. District Court,  
Western Dist. of Washington, Southern Division.  
Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M.  
Harshberger, Deputy. [117]

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**[Petition of Plaintiff That Suit be Dismissed  
Without Prejudice.]**

*In the Circuit Court of the United States for the  
Western District of Washington, Western Divi-  
sion.*

COLUMBIA RIVER PACKERS' ASSOCIA-  
TION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and I. N.  
STENSLAND,

Defendants.

To the Honorable, the Circuit Court of the United  
States for the Western District of Washington,  
Western Division:

Comes now the above-named plaintiff, the Colum-  
bia River Packers' Association, and respectfully rep-



resents and shows to this honorable Court as follows, that is to say:

That your petitioner instituted the above-entitled suit in the above-entitled court for the purpose of securing an injunction enjoining and restraining the defendants from trespassing upon the proprietary rights of the petitioner on, in and to and depriving him of the use and enjoyment of that certain tract of land and real property situated on the south shore of Sand Island (for a more particular description of said lands and property rights, reference is hereby made to the amended complaint filed herein), an island in the Columbia River, near its mouth, and lying south of the north ship channel of said river.

That said Sand Island is the same tract of land and the same Sand Island that is described and mentioned in the opinion of the Supreme Court of the United States in the suit hereinafter mentioned wherein the State of Washington was claimant and the State of Oregon was defendant.

That your petitioner instituted this suit in perfect good faith.

That, at and long prior to the institution of this suit, the officials of the State of Washington, both executive, [118] judicial, and legislative contended that said Sand Island was wholly within the *the* territorial limits and jurisdiction of the State of Washington, and denied that the State of Oregon, or its officers, executive, judicial, or legislative, had or could exercise any jurisdiction thereover and contended that the south boundary line of the State of Washington was the middle of the channel of the

Columbia River located immediately south of said Sand Island.

That said claims of exclusive jurisdiction over said island had been asserted as aforesaid and acted upon and sustained by the officials and courts of the State of Washington for many years prior to and were being so asserted and sustained at the time of this suit.

That pursuant to said claim the citizens of said State of Washington, and the officials thereof, at all times prior to the decision of the Supreme Court of the United States herein mentioned, had taken possession of and exercised exclusive dominion over all the fisheries and fishing rights pertaining to said Sand Island, and over all the water north of the south channel of the Columbia River, and asserted and assumed to exercise exclusive jurisdiction thereover.

That by reason of the acts and claims of said State of Washington and its officials and citizens your petitioner was advised and was led to believe that said Sand Island was within the territorial boundaries and jurisdiction of the State of Washington, and by reason thereof it instituted this suit in the above-entitled Court expecting and intending to maintain the same and prosecute it to final determination.

That since the institution of the above-entitled suit by consideration of the Supreme Court of the United States [119] duly rendered and entered on the 16th day of November, 1908, in the said cause wherein the State of Washington was claimant and the State of Oregon was defendant, it was held and judicially determined by said Supreme Court of the United States, that the boundary line between the

State of Washington and the State of Oregon is and at all times has been the north ship channel of the Columbia River and is located north of said Sand Island; and that said Sand Island is and at all times has been within the territorial limits and is a part of the territory of the State of Oregon.

Your petitioner therefore respectfully suggests that this Court has not the jurisdiction over the subject matter of this suit and by reason thereof your petitioner respectfully prays that this suit be dismissed, without prejudice.

THE COLUMBIA RIVER PACKERS'  
ASSOCIATION,

Petitioner.

By C. W. FULTON,

Of Its Attorneys.

C. W. & G. C. FULTON,

Attorneys for Petitioner. [120]

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*United States Circuit Court, Western District of  
Washington, Western Division.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIA-  
TION,

Plaintiff,

vs.

H. S. MCGOWAN et al.,

Defendants.

Filed \_\_\_\_\_

**Opinion on Plaintiff's Motion to Dismiss for Want of Jurisdiction.**

C. W. & G. C. FULTON, for Plaintiff.

WELSH, WELSH & O'PHELAN, for Defendants.

W. P. BELL, Attorney General of the State of Washington, Amicus Curiae.

DONWORTH, District Judge:

This is a suit in equity begun originally in this court in July, 1908. The plaintiff is a corporation organized under the laws of the State of Oregon and the defendants are citizens and residents of the State of Washington. The object of the suit is to obtain an injunction restraining the defendants from placing in any of the waters of the Columbia River in front of or adjacent to certain premises described as Sites Nos. 2 and 3 on Sand Island, and from maintaining in front of said premises in said waters any obstruction whatever, particularly certain obstructions alleged in the complaint to be there maintained by the defendants, and from interfering with the free and uninterrupted ingress to and egress from said premises. There is also a prayer that all obstruction placed in said waters in front of said premises be abated, and that the defendants be required to remove the same and for general relief. The amended complaint filed August 11, 1908, alleges that the United States is the owner of "that certain tract of land situated and located, within the County of Pacific in the State of Washington, the [121] same being an island in the Columbia River near the mouth of said River, which was and is generally



known and named upon all official records, maps and plats as Sand Island," and that pursuant to an act of Congress granting authority to the Secretary of War for that purpose, the plaintiff holds a valid lease for those certain portions of Sand Island designated on the maps and plats of the Government survey, as Sites Nos. 2 and 3, for the term of three years from May 1, 1908, "together with the tide lands water rights, fishing rights, and riparian rights adjacent thereto to the navigable channel of said Columbia River." It is further alleged that "said Sites 2 and 3 aforesaid, are on the south side of said Sand Island and are on the north shore of the main ship channel of the Columbia River, and within the jurisdiction of this Court, and within the Western District and Western Division thereof." It is also averred that "under the laws of the United States the said waters are required to be kept free from obstructions and that by virtue of said laws, and said lease aforesaid, plaintiff is entitled of right to have said waters and said channel of said river free and unobstructed, and is entitled of right to the free, unobstructed ingress to and egress from said premises, and is entitled of right to the exclusive right of operating seines for the purpose of catching salmon fish from said shores in the waters of said river and landing the same on said shores." The acts of the defendants constituting the alleged interference with plaintiff's rights are set forth in the amended complaint as follows:

"That in order to operate seines in front of said Sites 2 and 3 it is necessary that the waters

and channel of said river be free and unobstructed, for that it is necessary to lay each seine out into the waters of said river a distance of two or three hundred fathoms, each seine being about that long, and to permit the same to drift with the tide and current and then to haul the same in on the shore. That plaintiff was proceeding to so operate its said seines, under its licenses aforesaid and [122] under the same lease aforesaid, when the *the* defendants herein wrongfully and unlawfully and in violation of plaintiff's rights and in violation of the laws of the United States which prohibits the placing of any obstructions in the navigable waters of said river, and without the consent of plaintiff, but against plaintiff's consent, placed in the channel of said navigable waters of said Columbia River directly in front of plaintiff's leased premises and in front of said Sites 2 and 3 aforesaid, certain obstructions to the navigation of said waters consisting of *large to* which were attached wire cables and chains and large timbers for a float or buoy. That said obstructions were seven in number and were placed in the waters of said river about fifty to one hundred feet from the shore and about two or three hundred feet apart. That said stones and anchors, or weights, were large and of great weight and were so placed that plaintiff could not operate its seines in the waters of said river and could not land its seines or either thereof on the shores of said leased premises and absolutely prevented plaintiff from

operating seines on said lands and excluded the public generally from operating either gill nets, drift nets, or seines in the waters of said river.

That plaintiff thereafter and on the 2d day of July, 1908, at great labor and expense and time, removed all of said obstructions and was proceeding to operate its seines in said waters in front of said premises and land the same on the shores thereof when the said defendants, again on the 4th day of July, 1908, wrongfully and unlawfully and in violation of the laws of the United States aforesaid and against plaintiff's consent, placed six more of said obstructions in front of said premises aforesaid in practically the same position as those plaintiff removed, that is to say that each of said obstructions consisted of a large stone or stones of great weight to which were attached wire cables and chains, and the same were placed on the bed of the river and the float or buoy of large timbers were attached at the end of said cables; and that said obstructions were placed from fifty to one hundred feet from the shore of said Sites 2 and 3 and from two to three hundred feet apart and in such a position as to absolutely prevent plaintiff from operating its said seines and to prevent plaintiff from landing its seines or any seine on said shore.

That said obstructions are in the navigable waters of said river and are so placed as to prevent the free ingress to and egress from said



premises and interferes with and prevents free access to said premises.

That the defendants threaten to and will, unless restrained by this Court, continue to place other of said obstructions in said waters in front of said premises; and threaten to continue to use and employ the same and will do so unless restrained by this Court. That said obstructions so placed and those threatened to be placed are not placed for the purpose of trade or commerce or for any practical use, but are placed there for the purpose of harassing and annoying plaintiff and preventing plaintiff from operating its seines and interfering with and obstructing the free ingress to and egress from said premises, and none are placed there in good faith and each is an obstruction to the navigation of said river.

\* \* \* [123]

\* \* \* That the said trespass herein complained is continuous and the defendants will, unless restrained, continue daily to place said obstructions and other obstructions to the operation of plaintiff's seines, and will daily continue to exercise the exclusive right of fishery in front of said premises and will continue to harass and annoy plaintiff and prevent plaintiff from ingress to and egress from said premises."

On the filing of the complaint the Court fixed a time for hearing the application for an injunction pending the suit and at the same time issued a restraining order restraining the defendants "from in any manner interfering with the free ingress to



and egress from, and from placing and maintaining any obstruction or anchor or killock, or any timber, log, or appliance that will interfere with the use of a seine floating upon and navigating the waters of the Columbia River in front of or adjacent to Sites Nos. 2 and 3 on Sand Island." This order has not been dissolved. At the time of its issuance plaintiff was required to file an injunction bond in the penal sum of two thousand dollars.

Thereafter the defendants appeared and filed separate answers wherein, after denying and admitting certain of the allegations of the amended complaint, extensive affirmative matter is set forth. Briefly stated, the allegations of the defendants are to the effect that their acts in the premises were and are *bona fide* operations for the purpose of catching salmon fish by means of set nets under licenses issued by the Fish Commissioner of the State of Washington; that the objects maintained by them in the river in front of Sand Island were below the line of extreme low tide and were put and kept there for the purpose of operating said set nets and marking and holding the location thereof; that each set net was located by a stone anchor weighing about three hundred pounds, to which was attached a piece of chain about five feet long clamped to a wire rope about 25 feet long, and that to this was attached a cedar buoy about 4 feet long and [124] 8 inches square, upon which buoy was securely fastened the license number of each location. The affirmative portions of the answers set forth with a good deal of detail the facts upon which the defendants base their claim of the

right to maintain and operate nets and to prosecute the business of salmon fishing in this location. They further allege wrongful acts in the premises on the part of the plaintiff and pray affirmatively for relief by way of injunction for the purpose of preventing any interference by the plaintiff with their set nets, and necessary appliances. There are allegations of diverse citizenship and other allegations showing the purpose of the defendants to set forth a complete cause of action on their part against the plaintiff.

At the time of the commencement of the suit and the issuance of the restraining order and also at the time of the filing of the amended complaint and of the answers, both parties assumed and believed that the boundary between the States of Oregon and Washington was in the middle of the main ship channel of the Columbia River south of Sand Island, thus placing the island, and its shores, and the waters involved in this controversy wholly within the State of Washington. The location of the interstate boundary was at that time in litigation in a suit begun in the Supreme Court on February 26, 1906, by the State of Washington against the State of Oregon. That suit was decided by an opinion delivered May 24, 1909. *Washington vs. Oregon*, 213 U. S. ——. Since the final decision of the Supreme Court, the plaintiff has moved this Court to dismiss the pending suit for want of jurisdiction on the ground that the suit is a local one and concerns real estate and property situated in the State of Oregon and therefore not within the Western District of [125] Washington. The motion is registered by the defendants.

The question of jurisdiction has been fully argued and is now to be decided.

In view of the decision of the Supreme Court in the boundary suit between the two States, I must hold that Sand Island and the shores and waters constituting the place involved in this controversy, are south of the boundary line and lie within the State of Oregon. Counsel for defendants have urged with much vigor that the present Sand Island is not the same island as the one described by that name in the opinion of the Supreme Court. They assert that the Old Sand Island entirely disappeared several years ago and that the present island, bearing the same name, formed later by the action of the tides and currents, is north of the line which the Supreme Court has fixed as the boundary. They ask a reference to a Master for the purpose of ascertaining the facts in this regard. The answer to this contention is that the Supreme Court has clearly decided that the boundary is the channel north of the present Sand Island. In the opinion on petition for rehearing it is said: "There are practically two matters presented; one whether the boundary near the mouth of the Columbia River was and is the channel north of Sand Island. We held that it was, and with that conclusion we are still satisfied. It is unnecessary to restate the reasons, therefore." *Wash. vs. Ore.*, 213 U. S. ——. There is no doubt whatever that this decision fixes the boundary north of the Sand Island that now exists, and I so hold.

This brings us to the further inquiry whether this Court has jurisdiction to hear and determine this



cause and to enforce its decree therein by virtue of the legislation of Congress relating to concurrent jurisdiction on the Columbia River. [126] In *Nielsen vs. Oregon*, 212 U. S. 215, 316, that legislation is briefly summarized as follows:

“By par. 1 of the act of Congress of March 2, 1853, c. 90, 10 Stat. 172, all that part of the Territory of Oregon lying north of the ‘main channel of the Columbia River’ was organized into the Territory of Washington, and by par. 21 of the same act it is provided ‘that the Territory of Oregon and the Territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia River, where said river forms the common boundary between said territories.’ Section 1 of the act of Congress admitting Oregon into the Union (act of February 14, 1859, c. 33, 11 Stat. 383), after describing in detail the boundaries of the State, provides, ‘including jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with States and Territories of which those rivers form a boundary in common with this State.’ And in par. 2 it is said ‘the State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon so far as the same shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same.’”

The constitution of the State of Washington defines the State boundaries and makes no mention of



concurrent jurisdiction on the Columbia River, but, as will be shown later, the State has not lost such jurisdiction by reason of its failure to assert it by positive enactment. The territorial jurisdiction of this Court is defined in the act dividing Washington into two judicial districts. That act provides that certain counties lying east of the Cascade Mountains, with the waters thereof, shall be detached from the judicial district of Washington, and "that the residue of said State of Washington with the waters thereof, shall hereafter be the Western District of Washington." 33 U. S. Stat. pt. 1, 824. This language is ample to vest in this Court as broad a jurisdiction over that part of the Columbia River involved in this controversy as any State court might exercise, and is *to read* in connection with the former legislation of Congress above mentioned.

In *Nielsen vs. Oregon*, *supra*, it is said: [127]

"By the legislation of Congress the Columbia River is made the common boundary between Oregon and Washington, and to each of those States is given concurrent jurisdiction on the waters of that river. How that jurisdiction is to be exercised, what limitations there are, if any, upon the power of either State, is not in terms prescribed. It is true in the first section of the act admitting Oregon the jurisdiction was apparently limited to 'civil and criminal cases,' but in the second section of that act there was given in general terms 'concurrent jurisdiction.' In *Wedding vs. Meyler*, 192 U. S. 573, 584, construing the term 'concurrent jurisdiction,' as

given to Kentucky and Indiana over the Ohio River, this Court, reversing the Court of Appeals of Kentucky, said:

“Concurrent jurisdiction, properly so called, on rivers is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase. See *Sanders vs. St. Louis & New Orleans Anchor Line*, 97 Missouri, 26, 30; *Opsahl vs. Judd*, 30 Minnesota, 126, 129, 130; *J. S. Keator Lumber Company vs. St. Croix Boom Corp.*, 72 Wisconsin, 62, and the cases last cited.

“The construction adopted by the majority of the Court of Appeals seems to us at least equally untenable. It was held that the words “meant only that the States should have legislative jurisdiction.” But jurisdiction, whatever else or more it may mean, is jurisdiction in its popular sense of authority to apply the law to the acts of men. *Vicat Vocab.*, sub. v. See *Rhode Island vs. Massachusetts*, 12 Pet. 657, 718. What the Virginia compact most certainly conferred on the States north of the Ohio was the right to administer the law below low-water mark on the river, and, as part of that right, the right to serve process there with effect. *State vs. Mullen*, 25 Iowa, 199, 205, 206.’

Undoubtedly, one purpose, perhaps the primary purpose in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted

was committed on one side or the other of the exact boundary in the channel, that boundary sometimes changing by reason of the shifting of the channel. \* \* \* But, as appears from the quotation we have just made, it is not limited to this. It extends to civil as well as criminal matters, and is broadly a grant of jurisdiction to each of the States.”

In *State vs. Mullen*, 35 Iowa, 199, the Court sustained the conviction in Iowa of a person charged with maintaining a nuisance on a boat in the Mississippi River, although the boat was, for a portion of the time, resting on the soil of an island near to the Illinois shore, and within the territorial limits of Illinois. The rights of concurrent jurisdiction on the Mississippi River were substantially the same as on the Columbia. [128]

The Court said:

“If this boat is so upon the river that the person maintaining it there is amenable to the laws of this State, and our courts have jurisdiction to try and punish him for keeping a nuisance, it is a logical sequence that this jurisdiction must draw after it every thing necessary to make it effective and complete. We must either concede the right to abate the nuisance, or deny the right to try and punish the defendant for maintaining it.

A denial of the ‘drop of blood’ is equally a denial of the ‘pound of flesh.’ It is claimed that to allow the officers of the State to seize this boat *would* an invasion of the sovereignty of

the State of Illinois. If the defendant may be tried by the courts of this State for an act done upon the boat, it must follow that the officers of this State may arrest him upon the boat for the purpose of bringing him before the Court for trial. It would be inconsistent to say that the locus of a crime is within the jurisdiction of a court for the trial of an offense, and yet beyond it for the arrest of the offender. If the officers of this State may lawfully go upon the boat for the arrest of the defendant, why may they not lawfully do so for the seizure of the boat itself? If one is not an invasion of the sovereignty of the State of Illinois, why is the other?"

As above shown, this case is cited with approval in *Wedding vs. Meyler*, 192 U. S. 573, 585. In the *Annie M. Smull*, 2 Sawyer, 226 (Fed. Cas. No. 423), which is perhaps an extreme case, District Judge Deady sustained the jurisdiction in admiralty of the District Court of Oregon over a vessel moored at a wharf at Kalama on the Washington shore. See, also, in addition to cases cited above, *Memphis Packet Co. vs. Pikey*, 142 Ind. 304 (40 N. E. 527), and *State vs. Faudre*, 46 S. E. 269. Nor was it necessary that the State of Washington should by its constitution or otherwise assert its concurrent jurisdiction by expressly accepting the congressional enactments. "It must be remembered that this was legislation, and when it is enacted by the sovereign power that new States, when formed by that power, shall have a certain jurisdiction, those States as they come into existence fall within the range of the en-



actment and have the jurisdiction.” *Wedding vs. Meyler*, 192 U. S. 573, 583.

It is of course clear, as held in the case last cited, [129] that the concurrent jurisdiction given is jurisdiction “on” the river and does not extend to permanent structures attached to the river bed and within the boundary of the other State. Plaintiff’s counsel urge that the present case does not involve things “on” the river and contend that the cases of *Gilbert vs. Moline Water Power Co.*, 19 Iowa, 319, and *M. & M. Railroad Co. vs. Ward*, 67 U. S. 485, are controlling. To me, however, it seems clear that the parties in this case are here contending about things “on” the river. I have set forth with some fullness their respective allegations and claims and do not consider any extended reasoning necessary to demonstrate that the subject matter of the litigation is within both the letter and the spirit of the congressional enactments. The only objects involved which by any possible theory could be considered permanent structures are the stone anchors, and I cannot assume that the stones at the bottom of the river are the only or even the principal things concerned in the controversy. If it should be held that the mere fact of anchoring a floating object takes it out of the grant of concurrent jurisdiction, there would be little left of that jurisdiction. It is not necessary, in order to uphold the jurisdiction, that the Court have power to administer all of the relief asked; it is sufficient if the facts alleged show a substantial controversy between the parties within the jurisdiction of the Court. It is also urged that the case of *Roberts vs. Fullerton*,

117 Wis. 222 (93 N. W. 1111), is in point and is opposed to the views above stated. The question there involved, however, was chiefly legislative rather than judicial jurisdiction, and were it not so, I should in any event, feel bound by the decisions of the Supreme Court, to sustain the jurisdiction of this Court in the present case. Many nice questions must arise from conflicting State legislation [130] in these cases and I express no opinion at this time as to what law defines the rights of the parties at the place in controversy. But as between courts of concurrent jurisdiction the court that first acquires jurisdiction holds it to the exclusion of all others. The question as to what law will be the rule of decision between the parties relates to the merits and not to the jurisdiction.

If at the time of the commencement of this action the Court possessed the definite knowledge of the actual location of the State boundary which it now has, it is perhaps probable that the exercise of judicial discretion and with due regard for the comity of courts, the restraining order and injunction applied for would have been refused, leaving the plaintiff to seek a remedy in the courts sitting in the State of Oregon. But a different situation is now to be met. By reason of the action of the plaintiff in beginning suit in this court and obtaining the restraining order, the defendants have been prevented for an entire year from making any use of such nets and appliances as they may have had or may have purposed to have on the premises. If it should develop that they are in the right of the controversy (which is obviously a thing that cannot be known at this time) they

should not be deprived of such remedy as they may have under the injunction bond, or otherwise, for yielding obedience to the orders of a court which, under the legislation of Congress, was a court of competent jurisdiction.

Numerous reasons may be assigned for the action of Congress in granting concurrent jurisdiction to new States bounded by the great rivers; and though there are obvious difficulties, the conveniences far outweigh the disadvantages. The circumstances of the present case vindicate the wisdom of the [131] enactment. Valuable rights being in controversy in a situation near to the boundary line between the two States, and there being no process other than the writ of injunction that would prevent the use of force in the assertion of the divers claims, this suit was brought in this court on the assumption that the location was within its jurisdictional limits. In my opinion, the grant of concurrent jurisdiction sustains the right of this Court to hear and determine the controversy and to enforce its decree, regardless of the fact that by judicial determination the actual boundary is now found to be so situated as to place the location of the controversy in the other State. To decline to retain jurisdiction of this suit would be to refuse to apply the congressional enactment to a case peculiarly within the reason for its existence.

The motion to dismiss is denied.

GEORGE DONWORTH,

Judge.

Filed U. S. Circuit Court, Western District of Washington. Sep. 10, 1909. A. Reeves Ayres, Clerk. ———, Deputy. [132]

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*In the District Court of the United States, for the Western District of Washington, Southern Division.*

No. 1385-C.

COLUMBIA RIVER PACKERS' ASSOCIATION,  
a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, J. P. COYLE and ERICK LIND-  
STROM,

Defendants.

**Order Denying Petition of Plaintiff to Dismiss.**

The above-entitled cause having been heretofore argued and submitted to the Court upon the petition and motion of the plaintiff to dismiss this action for want of jurisdiction in this Court to try the case, and the Court, not being fully advised in the premises at the time said argument was made, took the same under advisement until this day.

Now, on this day, the Court being fully advised, it is ORDERED that said motion be and the same is hereby overruled and denied.

It appearing to the Court that this order was made on the 10th day of September, 1911, but through a mistake and oversight, the same was not entered of record that date.



It is ORDERED and ADJUDGED by the Court that this order be and the same is hereby entered as of such date.

EDWARD E. CUSHMAN,  
Judge of U. S. District Court, for Western District  
of Washington, Southern Division.

[Endorsed]: Filed in the U. S. District Court,  
Western Dist. of Washington, Southern Division.  
Jan. 31, 1914. Frank L. Crosby, Clerk. By F. M.  
Harshberger, Deputy. [133]

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*In the Circuit Court of the United States, Western  
District of Washington, Western Division.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,  
Plaintiff,

vs.

H. S. McGOWAN et al.,

Defendants.

**Order Allowing Filing of Supplemental Bill of  
Complaint, etc.**

Now on this date, coming on to be heard the above-entitled suit upon stipulation filed herein signed by the attorneys for the respective parties granting the plaintiff the right to file its proposed supplemental bill of complaint, and granting the answering defendants the privilege of filing an amended or supplemental answer and an amended or supplemental cross-bill or either or all, by either or all of the defendants: the plaintiff appearing by

Honorable G. C. Fulton, and the defendants by Messrs. Dorr & Hadley, and Messrs. Welsh & Welsh, and based upon said stipulation.

IT IS ORDERED that said plaintiff be and is hereby allowed to file its supplemental bill of complaint heretofore offered and that the defendants shall have thirty (30) days from October 17th, 1910, in which to plead thereto.

IT IS FURTHER ORDERED that the answering defendants or any of them are hereby allowed to file an amended or supplemental answer and are also allowed to file a supplemental or amended cross-bill or either or both.

IT IS FURTHER ORDERED that the time in which the said defendants shall file such amended or supplemental pleadings [134] is thirty days from October 17th, 1910, and plaintiff shall have thirty days after service of any such amended or supplemental pleading in which to plead thereto.

GEORGE DONWORTH,

Judge, Circuit Court.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Oct. 19, 1910. A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy. [135]

*In the Circuit Court of the United States for the  
Western District of Washington, Western Di-  
vision.*

IN EQUITY.

COLUMBIA RIVER PACKERS' ASSOCIATION,  
Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and I. N.  
STENSLAND,

Defendants.

**Supplemental Bill of Complaint.**

To the Honorable Judges of the Above-entitled  
Court:

The above-named complainant by this its supple-  
mental bill of complaint filed herein by leave of Court  
first had and obtained alleges:

I.

That on or before the ——— day of July, 1908, your  
orator exhibited his original bill of complaint in this  
honorable Court against H. S. McGowan, Erick Lind-  
strom, J. P. Coyle, Walter Bussey, and I. N. Stens-  
land, defendants herein, as defendants thereto  
thereby stating that the plaintiff is a corporation  
duly organized and existing under and pursuant to  
the laws of the State of Oregon and duly licensed and  
empowered as such to transact business in the State  
of Washington in accordance with the laws of said  
State; and further stating that defendants are citi-  
zens of the State of Washington and of the Western

District thereof and of the Western Division thereof; and further stating that long prior to the institution of said suit and the grievances therein complained of the United States of America was and still is the owner in fee of that certain island situated near the mouth of the Columbia River which was and is generally known and named upon all the official records, [136] maps, and plats as Sand Island, together with all tide lands, water rights, privileges, and easements surrounding and adjacent thereto and bordering thereon; and further stating that said Sand Island was by proclamation of the President of the United States duly issued and published on the 29th day of August, 1863, reserved from sale for military purposes and for military reservations, and the same is and ever since has been held and reserved as such by the United States; and further stating that said Sand Island was situated and located within the County of Pacific in the State of Washington; and further stating that pursuant to an act of Congress approved July 23, 1892 (27 Stat. 321) granting authority to the Secretary of War to lease for a period not to exceed five years such property of the United States under his control as should not for the time be required for public use duly and in the manner required and provided by law on the first day of May, 1908, duly leased to plaintiff Sites No. 2 and 3 on said Sand Island for the term of three years from said date, together with the tide lands, water rights, riparian rights, and fishing rights adjacent thereto; and further stating that the portion of said island so leased aforesaid, and being Sites No. 2 and



3 was and is all the frontage, tide lands, riparian rights, water rights, and privileges south, and the high lands north of a line drawn at the line of low-water mark on the Columbia River on the south side of said island beginning at a point 4,000 feet easterly along low-water mark from a point on low-water mark due west of the United States Monument No. 4 erected on said island by the United States Government surveyors, and so marked, thence easterly along the said shore line to the east boundary line of Site No. 4 on said Sand Island, said point being a point on said low-water line that would intersect a north and south line 781 [137] feet distant east of the United States Monument No. 6 erected on Sand Island by the United States Government surveyors, and so marked; and further stating that upon the execution and delivery of said lease the plaintiff immediately entered into the possession of said premises and the whole thereof, and the said premises described in said lease, namely the said Sites No. 2 and 3 above the line of low-water mark, consist of a sandy beach up to the line of high water and then it is composed entirely of sand, practically no vegetable grows thereon and the same is not susceptible to cultivation or agricultural uses and contains no mineral or phosphates of any kind. That the bed of said river below low-water mark is quite level with a hard sandy bottom with quite a gradual slope for a short distance into deep waters. That said Sites No. 2 and 3 aforesaid are on the south side of said Sand Island and further stating that the same are on the north shore of the main ships' channel of

the Columbia River and within the jurisdiction of this Court and of the Western District and of the Western Division thereof, and the same were and are of great value as and for the right to draw seines thereon and thereover and in the waters in front thereof, and were leased to plaintiff for such purposes; and further stating that plaintiff was duly licensed to operate three seines on said island; and further stating that plaintiff made all preparations necessary to do so and in order to operate the same it was necessary that no obstructions should be placed in the waters of said river in front of said premises; and further stating that plaintiff was preparing to operate seines in the waters in front thereof and to haul the same on the shore of said Sites 2 and 3 when the said defendants wrongfully and unlawfully and against its consent and without right placed divers and sundry obstructions in front of said [138] premises so that the plaintiff was unable to operate its said seines and threatened to *maintained* such obstructions and would so maintain the same unless restrained by this Court; and further stating that said premises are and at all times have been of great value for the right of fishery thereon and the right to haul and land seines thereon and in front thereof and to operate seines from the shore into the waters of the Columbia River and to haul the same on the shore thereof for the purpose of catching salmon fish during the salmon fishing season of each year on said river; and stating that under the laws of the United States the said waters are required to be kept free from all obstructions

and that said obstructions were not placed therein by virtue of any authority from the United States or any official thereof or department thereof.

## II.

Your orator further shows that said defendants, H. S. McGowan, Erick Lindstrom, and J. P. Coyle, being duly served with process of subpoenas, appeared to your orator's said bill and put in their separate answers thereto, whereby each alleged and admitted that said Sand Island and the said premises mentioned in plaintiff's bill of complaint were situated within the County of Pacific and in the State of Washington, and that thereupon it appears from the bill of complaint filed herein and the answers of said defendants as well as the cross-bills which said defendants filed with said bill of complaint, and each of said cross-bills filed by each of said defendants, that said Sand Island and said Sites No. 2 and 3 thereon and the premises in controversy were situated in the County of Pacific in the State of Washington; and now your orator shows by way of supplement that your orator has lately discovered, as the fact is, that the said Sand Island and the whole thereof and the said Sites 2 and 3 and the whole [139] of each thereof and the waters surrounding same are not within the County of Pacific and are not within the State of Washington, but that said Sand Island and the whole thereof and the said Sites 2 and 3 and the whole thereof and the waters surrounding the same are and at all times have been wholly included within the County of Clatsop and within the State of Oregon, and are and at all times



have been without and beyond the territorial boundaries of the State of Washington.

### III.

Your orator further alleges and shows to this Honorable Court that at the institution of this suit and at the filing of said bill of complaint, for many years prior thereto, the said Sand Island had ever been contended by the citizens and the officials of the State of Washington to be wholly within the boundaries of the State of Washington, and that such claim was practically admitted by the citizens of the State of Oregon, and the Fish Commissioner of the State of Washington at all times held that said Sand Island was included within the territorial boundaries of said State of Washington and the Master Fish Warden of the State of Oregon at all times conceded that the said Sand Island was wholly within the territorial boundaries of the State of Washington and recognized and accepted licenses issued by the Fish Commissioner of the State of Washington for seines used and employed on Sand Island and did not attempt to collect or profess to collect any licenses for seines operated on said island, and your orator at all times believed that the said Sand Island was wholly within the boundaries of the State of Washington until heretofore and on the 16th day of November, 1908, in a suit brought by the State of Washington in the Supreme Court of the United States against the State of Oregon for the purpose of determining the boundary line between the State of Oregon and [140] *and* the State of Washington, in which suit the State of Oregon was duly and regularly served with subpoena and process and duly



appeared and answered, and after a trial was duly had on the merits adjudged and decreed the boundary line between the State of Washington and the State of Oregon was north of said Sand Island and between the said Sand Island and the north shore of the Columbia River; and further adjudged and decreed that said Sand Island was wholly within the State of Oregon and was within the territorial boundaries thereof.

Your orator therefore alleges by this, its supplemental bill, that the said Sand Island is now and at all times has been within the County of Clatsop and in the State of Oregon and is not and never has been within the County of Pacific or within the State of Washington and is not and never has been within the territorial boundaries of the State of Washington; and your orator further alleges that it is informed and believes and therefore avers that this Court has no jurisdiction over this suit.

WHEREFORE your orator respectfully prays:

First: That if the Court shall be of the opinion that it has jurisdiction in the premises and of this suit, your orator have such judgment and decree as prayed for in its original bill of complaint; and

Second: That should the Court be of the opinion that it has no jurisdiction of this suit that this suit be dismissed and plaintiff go hence without day.

C. W. FULTON,

G. C. FULTON,

Attorneys for Plaintiff.

COLUMBIA RIVER PACKERS' ASSN.,

GEO. H. GEORGE,

Vice-Pres. [141]

State of Oregon,  
County of Clatsop,—ss.

I, Geo. H. George, being first duly sworn, depose and say that I am vice-president and general manager of plaintiff in the above-entitled suit; and that the foregoing supplementary complaint is true, as I verily believe.

[Seal]

GEO. H. GEORGE.

Subscribed and sworn to before me this 14th day of September, 1910.

G. C. FULTON,  
Notary Public for Oregon, Residing at Astoria,  
Oregon.

Commission expires Dec. 11th, 1911.

State of Oregon,  
County of Clatsop,—ss.

Due service of the within supplemental bill of complaint is hereby accepted in said county and State, this 15 day of September, 1910.

DORR & HADLEY, and

WELSH & WELSH,

Attorneys for Defendants.

Filed U. S. Circuit Court. Western District of Washington. Sep. 10, 1910. A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy. [142]

*In the Circuit Court of the United States for the  
Western District of Washington, Western Di-  
vision.*

No. —.

COLUMBIA RIVER PACKERS' ASSOCIATION,  
Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and I. N.  
STENSLAND,

Defendants.

**Separate Answer of H. S. McGowan to Supplemental  
Bill of Complaint, Supplemental Answer to  
Original Bill of Complaint, and Supplemental  
Cross-bill.**

The answer of H. S. McGowan, one of the defend-  
ants to the supplemental bill of complaint of the  
Columbia River Packers' Association, Plaintiff.

This defendant, now and at all times hereafter sav-  
ing to himself all and all manner of benefit or ad-  
vantage of exception or otherwise that can or may  
be had or taken to the many errors, uncertainties,  
and imperfections in the said bill contained, for an-  
swer thereto, or to so much thereof as this defendant  
is advised it is material or necessary for him to  
make answer to, answering, says:

This defendant admits that the plaintiff filed its  
original bill of complaint in this Honorable Court at  
the time therein alleged, and against the defendants,

and substantially alleging the matters and things now averred in plaintiff's said supplemental bill. Admits that defendant appeared and filed his answer and cross-bill, wherein it was admitted and averred that said Sand Island, and the fishing sites in controversy in this suit, were situated in Pacific County, in the State of Washington.

By way of further answering the plaintiff's said supplemental [143] bill, this plaintiff denies the allegation that said Sand Island, and the whole thereof, and the fishing Sites 2 and 3, and the whole thereof, and the waters surrounding them, are not now wholly within the State of Washington. Defendant denies that said Sand Island, or any part thereof, or the said Sites 2 and 3, or any part thereof, or the waters surrounding them, or any part thereof, have at all times been, or now are, included within the County of Clatsop, or within the State of Oregon, or without the territorial boundaries of the State of Washington.

This defendant admits that at the time of the institution of this suit, and for many years prior thereto, said Sand Island had been contended by the citizens and officials of the State of Washington, and admitted by the officials of the State of Oregon, to be wholly within the boundaries of the State of Washington, and that the Fish Commissioner of the State of Washington had collected license fees and issued fishing licenses for fishing seines and other fishing gear used and employed at and about Sand Island.

This defendant admits that a suit was brought in



the United States Supreme Court by the State of Washington against the State of Oregon for the purpose of determining the boundary line between said States, and that a decision in said boundary line suit was rendered by said Supreme Court on or about the 16th day of November, 1908, but denies that by said decision or otherwise or at all it appears or is true that said State boundary line now, at this time, lies to the northward of said Sand Island, and denies that said Sand Island, or any part thereof, is now within the territorial limits of the State of Oregon, or without or beyond the territorial limits of the State of Washington. [144]

Further answering, this defendant avers and charges the truth to be that by the said decision of the Supreme Court in said boundary line suit, the true boundary line between the States of Oregon and Washington is the center of the north ship channel of the Columbia River at and in the vicinity of said Sand Island, changed only, as it may be from time to time, through the process of accretion, and this defendant further avers that while it is true that at times in the past, there was a so-called north ship channel in said river, which lay to the northward of said Sand Island, yet, in truth and in fact, the waters of said north channel have since entirely shifted their course and position to the southward of said Sand Island, and that, at the present time, there is no ship channel and no channel at all to the northward of said Sand Island, and that the said so-called north channel which was referred to in the opinion of said Supreme Court in the said boundary line suit, is now, and at

this time, wholly to the southward of said Sand Island.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause or thing in the said plaintiff's said bills of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained. [145]

#### FURTHER AFFIRMATIVE DEFENSE.

By way of a further and supplemental answer and affirmative defense to plaintiff's original and supplemental bills of complaint herein, this defendant avers and charges the truth to be, that on the 19th day of June, 1908, and before any of the fishing licenses had been issued to plaintiff, under which plaintiff is attempting to claim the premises in controversy in this suit, and during the time that said boundary line suit was pending between the States of Oregon and Washington in the Supreme Court of the United States and before the decision of said Court in said boundary line suit was rendered, this defendant did, as a precautionary measure, and for

the purpose of protecting his rights in and to those certain set net fishing locations claimed by him, duly apply to the Master Fish Warden of the State of Oregon, he being the proper and only official of that State having authority to issue fishing licenses for the State of Oregon, for the issuance to defendant of four set net licenses for fishing within the territorial waters of the Columbia River, within the State of Oregon; that this defendant paid the license fees required by the State of Oregon for such fishing licenses, and that on the said 19th day of June, 1908, said Master Fish Warden of Oregon duly issued to this defendant four set net licenses numbered *respectfully* 142, 143, 144 and 145 of the set net fishing licenses of the State of Oregon, and that this defendant held said licenses, and all of them, at all times since the said 19th day of June, 1908, and that said licenses were in full force and effect, at all times after said date for one year, or until long after the time of the rendition of the decision of the Supreme Court in said boundary line suit. [146]

This defendant further avers that he has, agreeably to the laws and customs of the State of Washington, duly and seasonably and annually renewed his said two set net licenses, and each of them, which were issued to him by the Fish Commissioner of the State of Washington on the 15th day of April, 1908, as described in his original answer herein, and under which his said fishing locations were taken and held prior to the attempted occupation of the fishing grounds, in controversy, in this suit, by the plain-

tiff, and that said renewal licenses for the current year are now in full force and effect.

SUPPLEMENTAL CROSS-BILL.

For his supplemental cross-bill, this defendant hereby adopts and repeats all of the foregoing matters and things hereinbefore averred and charged.

WHEREFORE, this defendant prays as in his original answer and cross-bill herein.

DORR & HADLEY,  
WELSH & WELSH,

Solicitors for Defendant, H. S. McGowan.

State of Washington,  
County of Pierce,—ss.

H. S. McGowan makes solemn oath and says: I am the above-named defendant. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

H. S. McGOWAN. [147]

Sworn to before me this 10th day of November, A. D. 1910.

[Notarial Seal]                      C. D. SAVERY,  
Notary Public in and for the State of Washington,  
Residing at Tacoma.

Filed U. S. Circuit Court, Western District of Washington. A. Reeves Ayres, Clerk. By Sam'l. D. Bridges, Deputy. [148]



*In the Circuit Court of the United States for the  
Western District of Washington, Western Di-  
vision.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,  
Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.  
COYLE, WALTER BUSSEY and I. N.  
STENSLAND,

Defendants.

**Order Appointing Special Examiner.**

Upon reading and filing notice of motion for the appointment of a master or referee herein, with admission of service thereof, it is ordered by the Court that Charles D. Savery be and he is hereby appointed special examiner herein under the 67th rule as amended. The said special examiner shall take the testimony in behalf of both plaintiff and defendants, and is authorized to take the same in the City of Tacoma, District of Washington, or elsewhere according to the stipulation of parties, the taking of the testimony of the plaintiff to be commenced not later than the 20th day of September, A. D. 1910, and to be continued from time to time until completed, and thereafter the testimony of the defendants to be taken according to the convenience and requirements of the parties, at Tacoma or at such other place as they may stipulate. Said testimony shall be given orally by witnesses and be taken down stenographi-

cally by a skilled stenographer approved by the parties or appointed by the Court, and thereafter reduced to typewriting and when subscribed by the witnesses (unless such subscribing be waived) and duly certified, the same shall be admitted in evidence.

Done in open Court in the City of Tacoma, District of Washington, [149] Western Division, this 29th day of August, A. D. 1910.

GEORGE DONWORTH,  
Judge.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Aug. 29, 1910. A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy. [150]

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**[Request of Donworth, District Judge, That  
Counsel Appear for Further Hearing.]**

*In the District Court of the United States for the  
Western District of Washington, Southern Di-  
vision.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,  
Plaintiff,

vs.

H. S. McGOWAN,

Defendant.

*	*	*	*	*	*	*	*
*	*	*	*	*	*	*	*

C. W. & G. C. FULTON, for the Several Com-  
plainants.

WELSH & WELSH, DORR & HADLEY, HER-  
BERT W. MEYERS and C. C. DALTON,  
for the Several Defendants.

DONWORTH, District Judge:

I have read the testimony and exhibits in the above-entitled causes and have given the law applicable to the facts such consideration that I will be able to decide the cases promptly after a number of points upon which I desire further light from counsel are cleared up. I, therefore, request counsel in the several cases to appear in court at Seattle at some early date to be agreed upon by them to make clear certain points which have escaped me on account of the lapse of time since the oral argument. If practicable I would like to have this further hearing take place during the week beginning January 8th, not earlier than Tuesday of that week. I shall be in Tacoma on Monday the 8th, and in Seattle the rest of the week.

GEORGE DONWORTH,  
District Judge. [151]

[Endorsed]: Filed U. S. District Court, Western District of Washington. Jan. 6, 1912. A. W. Engle, Clerk. By James C. Drake, Deputy. [152]

*In the United States District Court, Western District of Washington, Southern Division.*

No. 1385.

**COLUMBIA RIVER PACKERS' ASSOCIATION,**  
Complainant,

vs.

**H. S. McGOWAN et al.,**  
Defendants.

**Memorandum Decision on Final Hearing.**

C. W. & G. C. FULTON, for Complainant.

WELSH, WELSH & O'PHELAN and DORR &  
HADLEY, for Defendants.

DONWORTH, District Judge:

This is a suit in equity originally begun in the United States Circuit Court for the Western Division of this District, and by operation of law the case is now in this court for decision.

Complainant, as the lessee of certain sites on Sand Island in the Columbia River, sues to enjoin the defendants from constructing and maintaining in the waters of that river, below low-water mark, certain fishing appliances known as "set nets," placed there by defendants and held in place by stone anchors, to which were attached chains and buoys. At a former hearing it was held that the Circuit Court of this District had jurisdiction of the suit although Sand Island and the location in controversy were and are on the Oregon side of the boundary dividing that State from the State of Washington. Columbia



River Packers' Association *vs.* McGowan, 172 Fed. 991. The principal facts are stated in the former opinion. [153]

In the limited time at my disposal I am not able to prepare an opinion properly setting forth the reasons by which I have arrived at a conclusion on the merits, and citing the authorities which I have considered. This memorandum, however, will indicate my views on the chief points involved.

1. I adhere to the views expressed in the former opinion (173 Fed. 991), that the location in controversy is within the limits of the State of Oregon.

2. By a reasonable construction of the statute of the State of Oregon ceding Sand Island to the United States and the lease which the United States made to complainant, complainant's rights as lessee extend to the line of ordinary low water.

3. The right of fishery being a common right, no person has an exclusive right in the absence of a statute to fish in any particular waters of the Columbia River. The regulation of this common right as between different individuals is a matter governed by the State statute. It is for the State to say by its statutes what methods of fishery may be employed and how, where and when the different individuals may fish, subject to the paramount laws of the United States for the protection of navigation which are not involved here. A person complying with the provisions of the statute obtains thereby a legal right to fish in the location which the statute authorizes him to appropriate, it being a necessary consequence of the right to regulate that individuals who comply

with the regulations obtain at least a present right to hold and occupy particular locations for fishing purposes. The premises leased by complainant are so situated that it can conveniently prosecute the business of salmon fishing by means of drag seines drawn through the water in front of the premises and hauled upon the [154] shore. No person other than complainant can use the shore at this point for drag seine operations, because to do so would be to trespass upon complainant's leasehold premises. This privilege, however, is a privilege only, consequent upon complainant's having an interest in the land adjoining the water. It does not constitute a right *with* the meaning of the term "riparian or littoral rights" and complainant is not entitled to compensation if it is deprived of that privilege by operation of the fisheries statute. The statutes of both Oregon and Washington authorize various appliances for catching salmon, among others, set nets. They authorize the issuance of set net licenses, the necessary effect of which is to permit the *licenses* to locate a set net in some definite location. These statutes also prescribe a method by which the owner of premises available for drag seine operations may appropriate a location for that purpose in front of his land.

4. It is conceded by complainant's counsel that defendants complied with the statutes applicable to procuring set net licenses and locating appliances thereunder, except for the point (claimed by complainant) that such set nets cannot lawfully be placed so as to interfere with the drag seine fishery con-

ducted by complainant or to interfere with its access to deep water, and except for the further point that the buoys which the defendants anchored to mark the location of their set nets were not marked with the letter "O" and the number of an Oregon license, but carried only the number of the Washington licenses issued to defendants and the symbol required by the Washington statute. Complainant's contention in this regard is twofold: First, that complainant as a riparian or littoral owner is entitled to access at all times to the [155] waters in front of its leasehold premises and is entitled to prevent the placing of any structure or other appliance in those waters which will interfere to any extent whatever with such access, and secondly, that complainant has a right to prosecute the drag seine fishery which attaches to its leasehold as a necessary incident thereto, and that any interference with that right may be enjoined. So far as concerns riparian or littoral rights including the right of access, I hold that before an injunction should issue in favor of a shore owner against the maintenance of fishing appliances authorized by State statute below low-water mark and beyond the limit of private ownership, a real and substantial interference with the shore owner's right of access must be shown. Riparian or littoral rights cannot be used as a means for securing a monopoly of the rights of fishing in the common waters in front of premises bordering on a sea or river. Here it does not appear that defendant's set nets will do more than prevent the drawing of seines below low-water mark. Empty spaces several hundred feet wide are left between the



set nets and they interfere with nothing but complainant's proposed fishing operations in deep water. So far as concerns complainant's claim that any interference with its drag seine operations is an interference with its property rights, I am unable to sustain its contention. Defendants, having a State license to maintain and operate set nets, had a right to choose their location so as to appropriate a certain portion of the common fishery. If they chose a location where complainant intended to operate a drag seine, but for which location it had secured no right under the State law, it was complainant's misfortune. Under the statutes of both States, he who is first in time in securing a location is first in right, and the upland owner is given no [156] advantage as to priority over others. At the time this controversy arose and prior thereto ever since the separation of Oregon and Washington, it was supposed by almost everyone that Sand Island was in Washington. Defendants in selecting their location complied literally with the Washington law and complied substantially with the Oregon law. I think these facts (especially when considered in connection with the concurrent jurisdiction of both States on the Columbia River) give the defendants priority over complainant who had not complied or attempted to comply with the laws of either State. The restraining order issued in complainant's behalf in July, 1908, is still in force and has prevented defendants from continuing their possession of the location ever since. Under such a condition it must be presumed that but for the restraining order the defendants would have lawfully



continued to the present date the possession and rights which they had secured at that time.

5. I have had considerable difficulty in determining the question of fact as to whether defendants acted in good faith in locating the set nets in front of the leased premises. McGowan was an unsuccessful bidder for the leasehold rights. He had formerly conducted drag seine operations at the same place. A number of witnesses have testified that set nets cannot be successfully operated there. If it appeared that defendants located their set nets at that point for the sole purpose of harassing complainant and without any reasonable expectation of making a profit out of the fish to be caught therein, I would grant the injunction prayed for. The presumption, however, is in favor of good faith and the fishing business is one peculiarly subject to uncertainty. I am not [157] able to say from the evidence that it is established that defendants' location of the set nets was merely for the purpose of harassing or embarrassing complainant. They had a right to choose their location and to make reasonable endeavors to catch fish, and the fact that set nets would catch fewer fish than a drag seine at this point cannot determine the controversy.

6. It follows that complainant's prayer for injunction must be refused, and the restraining order heretofore issued must be dissolved. There will be a reference to a master to ascertain the damages recoverable by defendants under the bond given on the restraining order. The measure of damages is one of the subjects discussed by the parties in their briefs.

I do not consider that it would be a proper measure of damages to try to estimate how many fish defendants would have caught in the set nets and how much profit they would have made from them. Such a method is entirely too conjectural. Defendants are entitled, however, to the reasonable net rental value of the set net location out of which they had been kept by reason of the restraining order. While the probable catch of fish by means of the set nets would be one of the circumstances affecting the net rental value, it would not, in itself, be the measure of damage. There will be a reference to a master to ascertain and report the amount of damages. He will consider the evidence already taken so far as it bears upon this point and such other evidence as the parties may introduce within such time as may be allowed by the Court.

An interlocutory decree will be entered accordingly.

GEORGE DONWORTH,  
Judge. [158]

Filed U. S. District Court, Western District of Washington. Jan. 24, 1912. A. W. Engle, Clerk.  
R. W. Jamieson, Deputy. [159]

*In the District Court of the United States for the  
Western District of Washington, Southern Divi-  
sion.*

No. 1385.

(Circuit Court.)

COLUMBIA RIVERS PACKERS' ASSOCIA-  
TION, a Corporation,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM and J.  
P. COYLE,

Defendants.

**Interlocutory Decree.**

This cause came on to be heard at this term, and was argued by counsel, C. W. Fulton and G. C. Fulton, Esquires, appearing for plaintiff, and Welsh & Welsh and Dorr and Hadley, appearing for defendants and cross-complainants (defendants Walter Bussey and I. N. Stensland having been heretofore dismissed from this suit by consent without costs), and thereupon, upon consideration thereof, it was adjudged and decreed as follows:

That the Columbia River Packers' Association, a corporation, plaintiff herein, shall take nothing by this suit, and that the temporary injunction and restraining order heretofore issued against the defendants upon the application of plaintiff, and entered herein, and the same is now and hereby dissolved and vacated; that the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and

J. P. Coyle, were, at the time of the commencement of this suit and ever since have been, and now are, and until the expiration of the current fishing license year hereinafter referred to, will be entitled to the exclusive right to construct, maintain and operate the set nets and other appliances which they had constructed in the months of [160] June and July, 1908, on the fishing grounds hereinafter in this decree described and referred to, and to use the said nets and appliances for fishing; that plaintiff did not have, at the time of the institution of this suit, and has not, at any time since, had any right to interfere with said defendants and cross-complainants in their occupation and use of said nets and appliances, or with the locations therefor, described and referred to in the pleadings in this suit, and that plaintiff's interference therewith was without right, license or authority; that at all times since the commencement of this suit the defendants have had the right and now have the right to reconstruct and to maintain and operate for fishing purposes in said location set nets and appliances of the same kind and character and covering the same area as those which they constructed as aforesaid in the year 1908, that the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, and each of them, are awarded an injunction as hereinafter set forth against the plaintiff from this time henceforth until the end of the current fishing license year, which said license year will expire on the 31st day of March, 1912, under the provisions of the statutes of the State of Oregon; that the said defendants and cross-complainants, H.



S. McGowan, Erick Lindstrom and J. P. Coyle, also are entitled to personal judgments against the plaintiff and its surety on its injunction bonds (to wit: the United States Fidelity and Guaranty Company), for damages sustained by said defendants and cross-complainants because of their having been deprived by plaintiff of the use of said nets and appliances from the 7th day of July, 1908, the date upon which the said temporary injunction was issued until this date, not, however, exceeding the sum of twelve thousand dollars (\$12,000) as against [161] the said surety, recovery against it being limited to that amount by its undertakings as surety on the two injunction bonds filed herein by and on behalf of said plaintiff.

AND IT IS THEREFORE ordered, adjudged and decreed that the plaintiff, the Columbia River Packers' Association, its officers, agents, attorneys, servants and employees, and all persons acting or claiming, or to claim by, through, or under said Columbia River Packers' Association, be and they are, from this time henceforth, until and during the 31st day of March, 1912, enjoined and restrained from interfering with the quiet and peaceable enjoyment by the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, and by those acting or claiming, or to claim by, through or under them, or either of them, of the right to construct, maintain and operate said set nets and appliances to the same extent and in the same location as said defendants occupied in June and July, 1908, and from interfering with the erection, location or main-

tenance by said defendants in the waters of the Columbia River below the line of ordinary low tide of such piles, buoys, or other things as may be necessary or proper for the purpose of enabling said defendants to comply with the laws of the State of Oregon relating to securing, holding or marking the same set net locations as they occupied in June and July, 1908.

Said fishing locations are situated in the Columbia River off the southerly side of Sand Island, below the line of ordinary low tide, and above, or to the northward of the Government's fairway or channel line, whereat fishing may be carried on with fixed appliances without special Government permits. Said fishing locations are further described as lying immediately to the southward below and in front of the low-tide line which [162] is the south boundary line of Government Sites numbered 2 and 3 lying along the shore of said Sand Island, which said low-tide line is described in the amended bill in this suit as follows:

“A line drawn on the line of low-water mark on the Columbia River on the south side of said island beginning at a point 4,000 feet easterly along low-water mark from a point on low-water mark due west of the United States Monument No. 4 erected on Sand Island by the United States Government surveyors, and so marked; thence easterly along the said shore line to to the east boundary line of Site No. 4 on said Sand Island, said point being a point on said low-water line that would intersect a north and south

line 781 feet distant east of the United States Monument No. 6 erected on Sand Island by the United States Government surveyors, and so marked."

IT IS NOW FURTHER ORDERED, adjudged and decreed that the three defendants and cross-complainants, and all of them, do recover of plaintiff their costs, and disbursements in this suit to be taxed.

ALL OF WHICH IS FINALLY ADJUDGED AND DECREED.

IT IS FURTHER ordered and decreed that for the purpose of determining the amount of damages to be assessed against the plaintiff, this cause is hereby referred to Honorable M. A. Langhorne, a commissioner of this court, residing in the city of Tacoma, Pierce County, Washington, as Master *pro hac vice*, to ascertain and report to this Court the amount of damages suffered by the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, through their having been deprived of the use of said nets and appliances from and after the seventh day of July, 1908, the date upon which the aforesaid temporary injunction was issued, up to and until the date of this decree; and to that end, said Commissioner may consider the testimony heretofore taken in this cause, and may hear such other and further testimony bearing upon the question and amount of damages sustained and to be recovered as aforesaid, as the parties, or either of them, may offer; that upon the conclusion of the [163] hearing, the said Commissioner shall report his findings and conclusions to this Court, together



with any further testimony which may have been taken before him.

IT IS FURTHER ordered that any additional testimony which may be desired on the part of said cross-complainants shall be taken within twenty days from the date of this decree, and the taking of any additional testimony which may be desired on the part of the plaintiff shall be taken within twenty days thereafter, unless the times are enlarged by stipulation of the parties, or by order of said Special Master.

To all of the above, and to every part thereof, the plaintiff, in open court, duly excepted, and the exceptions were duly allowed by the Court.

All done in open court this the 5th day of February, A. D. 1912.

GEORGE DONWORTH,  
Judge.

Filed U. S. District Court, Western District of Washington. Feb. 5, 1912. A. W. Engle, Clerk.  
By James C. Drake, Deputy. [164]

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*In the District Court of the United States, for the  
Western District of Washington, Southern Di-  
vision.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,  
a Corporation,  
Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, and J. P.  
COYLE,  
Defendants.



**Report of Special Master, Including Findings of Fact  
and Conclusions of Law.**

To the Honorable Edward E. Cushman, Judge of  
the Above-entitled Court:

The above cause having heretofore duly come on for hearing before the Honorable George Donworth, then one of the Judges of this court, upon the right of the plaintiff to enjoin the defendants in this cause from occupying their set net fishing locations described in the pleadings herein; and the Court having heard the evidence thereon and having on the 5th day of February, 1912, entered his interlocutory decree herein whereby the plaintiff's prayer for injunction was denied, and the temporary restraining order theretofore issued against the defendants was dissolved; the Court having in said decree provided that for the purpose of determining the amount of damages to be assessed against the plaintiff this cause should be referred to the undersigned, as Special Master to ascertain and report to the Court the amount of damages, if any, suffered by the defendants and [165] cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, through their having been deprived of the use of set nets and appliances from and after the 7th day of July, 1908, the date upon which the aforesaid temporary injunction was issued, up to and until the date of said interlocutory decree; and the Court having further provided in said decree that the said Commissioner should consider the testimony theretofore taken in this cause and should hear such other and further

testimony bearing upon the question of the amount of damages sustained and to be recovered, as aforesaid, as the parties, or either of them might offer, and said decree having further provided that said Commissioner should upon the conclusion of the hearing, report to this Court his findings and conclusions, together with any further testimony taken before him, as aforesaid; and the parties having heretofore, to wit: on the 23d, 24th and 25th days of April, 1912, taken further testimony before the undersigned, as Special Master, which has been fully transcribed and is herewith submitted and filed as a part of this report; the Special Master having heard and considered said testimony, as well as that previously taken before the Court, and having considered the said decree and also the opinion of the Court on file in this cause, and having heard the arguments of counsel and being now fully advised in the premises, makes the following

#### FINDINGS OF FACT.

##### 1.

The long-established method by custom among fishermen of determining the rental value of fishing locations upon the Columbia River is, that the owner or lessor of a fishing location shall receive as rent for the location [166] during a given fishing season one-third of the gross catch of fish made at said location during the fishing season; when the lessee furnishes the fishing gear, the lessee is entitled to two-thirds of the gross catch. However, when the lessor furnishes the fishing gear, as well as the loca-

tion, he is entitled to one-half of the gross catch for his rent for the location and the gear and the lessee is entitled to one-half of the gross catch.

## II.

Under the rule for fixing the rental value of fishing locations upon the Columbia River as set forth in finding of fact No. 1, it is impossible to determine the value without ascertaining the amount of the actual or probable catch of fish at a given location for a given season.

## III.

The defendants and cross-complainants, up to the time of the interlocutory decree herein, had by the restraining order issued in this case and had by the act of the plaintiff, been deprived of their fishing locations and of the use of their set nets therein during the entire time of four fishing seasons, viz.: the fishing seasons of the years 1908, 1909, 1910 and 1911.

## IV.

During the entire time of the four fishing seasons mentioned in finding of fact number three (3), the plaintiff occupied the defendants' fishing locations and operated drag seines thereon for the purpose of catching salmon and did catch large amounts of salmon each season, the amount of catch being as follows: [167]

In the year 1908, 150 tons.

In the year 1909, 104 tons.

In the year 1910, 135 tons.

In the year 1911, 390 tons.

Total for four years, 779 tons.

## V.

The set nets which the defendants would have operated upon said fishing locations had they not been prevented by plaintiff from occupying the locations would have caught two-thirds as many fish and two-thirds as much in quantity each year as were caught by the plaintiff's drag seines, that is to say, two-thirds of 779 tons, the amount shown by finding of fact number four (4) as actually caught by the drag seines, making 518 tons which defendants' set nets would have caught during the four fishing seasons.

## VI.

I find that by reason of the foregoing facts the defendants were in the position of forced lessors of the locations in question, inasmuch as they owned them and were entitled to them, but the plaintiff, through its own act and through the aid of the restraining order heretofore mentioned, occupied and fished them and appropriated the entire output to its own use, and defendants were therefore in position of lessors furnishing the location without furnishing fishing gear, and they were therefore entitled to one-third of the gross catch of what their set nets would have caught upon said locations, that is to say, one-third of 518 tons, being 172 tons.

## VII.

As set forth in finding of fact No. 6, the amount of fish to which defendants were entitled as the [168] rent for the four seasons was in the aggregate, 172 tons, and I find that the average price of the fish for the four seasons was \$130.00 per ton, and the 172



tons of fish were of the value of \$22,360.

VIII.

The defendants and cross-complainants were equally interested in the said fishing locations.

From the foregoing Findings of Fact, I make the following

CONCLUSIONS OF LAW.

I.

The value of 172 tons of fish was the aggregate rental of defendants' fishing locations for the four fishing seasons, and that value is the measure of defendants' damages in the aggregate. The value, as set forth in the Findings of Fact being \$22,360, the defendants are entitled to recover that amount in the aggregate.

II.

The three defendants and cross-complainants, namely, H. S. McGowan, Erick Lindstrom and J. P. Coyle, are equally interested in the damages and should have a judgment accordingly.

MAURICE LANGHORNE,

Special Master.

[Endorsed]: Filed U. S. District Court, Western District of Washington. May 13, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [169]

*In the District Court of the United States for the  
Western District of Washington, Southern  
Division.*

COLUMBIA RIVER PACKERS' ASSOCIATION,  
a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P.  
COYLE,

Defendants.

**Exceptions to Report of Special Master.**

Comes now the above-named plaintiff and files herein its exceptions and objections to the report, findings of fact and conclusions of law made and filed herein by the Special Master heretofore appointed by the above-entitled court.

I.

The plaintiff excepts to finding of fact No. I, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

II.

Plaintiff also excepts to finding of fact No. II, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evi-

dence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein. [170]

### III.

Plaintiff also excepts to finding of fact No. III, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

### IV.

Plaintiff also excepts to finding of fact No. IV, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

### V.

Plaintiff also excepts to finding of fact No. V, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

## VI.

Plaintiff also excepts to finding of fact No. VI, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein. [171]

## VII.

Plaintiff also excepts to finding of fact No. VII, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

## VIII.

Plaintiff also excepts to finding of fact No. VIII, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

## IX.

Plaintiff excepts to conclusion of law No. I, and to the whole thereof, and each and every part thereof, on the ground that the same is not supported by the evidence and is contrary to and against the evidence,



and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

X.

Plaintiff excepts to conclusion of law No. II, and to the whole thereof, and each and every part thereof, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

G. C. FULTON,  
Attorney for Plaintiff. [172]

State of Oregon,  
County of Clatsop,—ss.

I, G. C. Fulton, being first duly sworn, on oath depose and say: That on May 17, 1913, I served the within and foregoing exceptions to the report of the Master filed herein in the above-entitled suit upon Messrs. Dorr & Hadley, attorneys for defendants, by depositing a copy thereof in the United States postoffice at Astoria, Oregon, enclosed in a sealed envelope, with postage prepaid, addressed to Messrs. Dorr & Hadley, Attorneys at Law, Coleman Building, Seattle, Washington; and I also served a copy of said exceptions upon Messrs. Welsh & Welsh, attorneys for defendants, by depositing a copy of the foregoing exceptions in the United States postoffice at Astoria, Oregon, in a sealed envelope, with postage prepaid, addressed to Messrs. Welsh & Welsh, Attorneys at Law, South Bend, Washington, all on the said 17th day of May, A. D. 1913, said addresses of

said attorneys aforesaid being their regular post-office addresses and places of abode.

G. C. FULTON.

Subscribed and sworn to before me this 17th day of May, A. D. 1913.

[Seal]

A. A. ANDERSON,  
Notary Public for Oregon.

Filed U. S. District Court, Western District of Washington. May 19, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [173]

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*In the District Court of the United States for the  
Western District of Washington, Southern  
Division.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,  
a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P.  
COYLE,

Defendants.

**Motion for Confirmation of Findings and Conclusions  
of Special Master, and also for Final Judgment  
and Decree.**

Come now H. S. McGowan, Erick Lindstrom, and J. P. Coyle, defendants in the above-entitled cause, by Welsh & Welsh and Dorr & Hadley, their attorneys, and move the Court to approve and confirm the report, findings of fact, and conclusions of law

returned by Hon. M. A. Langhorne, Special Master herein, which report, including said findings and conclusions, is now on file with the records of this cause; and said defendants also move the Court for the entry of final judgment and decree in this action in accordance with said findings of fact and conclusions of law.

WELSH & WELSH, and

DORR & HADLEY,

Attorneys for Defendants.

[Endorsed]: Service of the within motion is accepted and receipt of copy admitted this 19th day of May, 1913.

G. C. FULTON,

Attorney for Plaintiff.

Filed U. S. District Court, Western District of Washington. May 22, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [174]

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**[Opinion on Report of Master.]**

*In the District Court of the United States, Western  
District of Washington, Southern Division.*

No. 1358.

COLUMBIA RIVER PACKERS' ASSOCIATION,  
a Corporation,

Complainant,

vs.

H. S. MCGOWAN, ERICK LINDSTROM and J. P.  
COYLE,

Defendants.

Filed, August 12, 1913.

C. W. & G. C. FULTON, for Complainant.

WELSH & WELSH,

DORR & HADLEY, for Defendants.

CUSHMAN, District Judge.

Complainant, as the lessee of certain fishing sites on Sand Island, in the Columbia River, sues to enjoin the defendants from constructing and maintaining, in the waters of said river, below low-water mark, certain fishing appliances, known as "set nets," placed there by the defendants. Upon a former hearing, it was held that the plaintiff was not entitled to such injunction, and, upon the cross-complaints of defendants, it was held that they were entitled to an injunction against the plaintiff, and that they should recover their damages against the plaintiff and its bondsmen, for which purpose the cause was referred to a Special Master.

In the opinion rendered upon the merits, the Court said: [175]

"I do not consider that it would be a proper measure of damages to try to estimate how many fish defendants would have caught in the set nets and how much profit they would have made from them. Such a method is entirely too conjectural. Defendants are entitled, however, to the reasonable net rental value of the set net location out of which they have been kept by reason of the restraining order. While the probable catch of fish by means of the set nets would be one of the



circumstances affecting the net rental value, it would not, in itself, be the measure of damage."

Upon the special reference, the Master found:

"The long established method by custom among fishermen of determining the rental value of fishing locations upon the Columbia River is, that the owner or lessor of a fishing location shall receive as rent for the location during a given fishing season one-third of the gross catch of fish made at said location during the fishing season. When the lessee furnishes the fishing gear, the lessee is entitled to two-thirds of the gross catch. However, when the lessor furnishes the fishing gear, as well as the location, he is entitled to one-half of the gross catch for his rent for the location and the gear and the lessee is entitled to one-half of the gross catch."

The Master based the recovery allowed the defendants upon this finding—allowing them one-third of what he found to be the value of their *probable* in 1908, 1909, 1910 and 1911. The cause is now for determination upon plaintiff's exceptions to the Master's report, the chief exception urged being to the foregoing finding, it being contended that the same was contrary to the decision of this Court, as above quoted.

Upon the hearing of the exceptions, the original controversy was argued to considerable extent, but it is held that all questions in the main controversy have been concluded, so far as this Court is concerned, by the decision already rendered. The only matter properly before the Court upon the exceptions

being the question concerning the amount of damages to be awarded and the measure, or rules to be applied in ascertaining such damage. [176]

The complainant excepts to the recovery by the defendants and cross-complainants of anything for the year 1911. This question was fully considered and covered by the interlocutory decree. Plaintiff further excepts to the Master's finding concerning the year 1911, because of the fact that, at the time the suit was instituted, plaintiff occupied Sites Nos. 2 & 3 on Sand Island; the controversy arose over defendants' locations immediately in front of these sites; that, as in the year 1911, plaintiff had leased from the Government an additional site (No. 1), and that its catch of three hundred ninety tons of fish for that year included the fish caught by it in front of Site No. 1, in which defendants would have no interest and which would not be included in the issues in the suit. The question of the number of fish, if any, caught by the plaintiff in front of Site No. 1, in 1911, was gone into upon the evidence and the Court finds the Master's finding concerning that year supported by the preponderance of the evidence.

The Master found that defendants' nets, if their operation had not been prevented by plaintiff, would have taken two-thirds as many fish as were, in fact, caught by plaintiff in its seines. From the testimony offered by the plaintiff, the Master found that it caught, during the years 1908, to and including, 1911, seven hundred seventy-nine tons of fish, two-thirds of which, or five hundred eighteen tons would have been caught by defendants. The Master further

found that the customary rental for fishing locations on the Columbia River, where the lessee furnished all the fishing gear, was one-third of the total catch of fish, which in the present case, for the years involved, would amount to one hundred seventy-two tons of fish, at an [177] average price, for the years mentioned, of One Hundred Thirty Dollars per ton, making a total value for the years mentioned of Twenty-two Thousand Three Hundred Sixty Dollars.

The Court rejected the claim that the total profit of the fishing operations—to which was necessary, not only the site, itself, but the expenditure of money, the labor of men, attention of the lessee and the necessary equipment for such operations—would be the proper measure of damage for loss of the location. Such a method was, as the Court held, too conjectural—necessarily so, because of the uncertainty in calculating the amount of the net profits to be credited to that portion of the investment and work not represented by the location, itself.

This is the sense in which the words used in the former decision were used, rather than in the sense that any method which took into account the probable catch as a basis for computing the rent, was too uncertain and speculative a basis from which to determine the rental value. No effect can be given the following words, found in the decision, by any other construction:

“While the probable catch of fish by means of set nets would be one of the circumstances affecting the net rental value, it would not, in itself, be the measure of damage.”



Thus it was determined that evidence of the probable catch was admissible for the purpose sought, not to allow the total cost as rental, nor all the profits from the catch, but as a quantity from which to calculate the rental value.

In the *Pacific Steam Whaling Co. vs. Alaska Packers' Assn.*, 72 Pacific, pp. 161 to 165, in considering what damages should be recovered *when has* been wrongfully deprived of a fishing location, where in fixing the probable catch of the plaintiff, the actual catch of the defendant [178] was shown, the Court said:

“But a wrongdoer cannot entirely escape the consequences of his unlawful acts merely on account of the difficulty of proving damages. He can do so only where there is no possibility of a reasonably proximate estimation of such damages, which is not the fact in the case at bar.”  
(At p. 163.)

Exception is also taken to the insufficiency of the evidence to establish what the plaintiff terms “a custom on the Columbia River, or Lower Columbia River to allow as rental one-third of the catch where the lessee furnishes everything except the site.” It is not clear that the Master used the word “custom” in his finding in the restricted sense, which the plaintiff in its argument seeks to have put upon it. Little, if anything, is shown by the evidence to establish that set net locations had been rented in the lower Columbia River for a rental of one-third of the catch, but it was amply shown that fishing locations on the



Columbia River, generally, were frequently so rented.

Where the matter for consideration concerns a contract, or the action of individuals voluntarily taken with relation to one another, it might be held that the evidence of custom in this case was too meager to justify the conclusion that the parties contracting, or acting, presumably took into account such custom for, in such case, the one invoking the custom would, of necessity, have to show that it was acted upon with such frequency, and was so prevalent as to import knowledge on the part of the parties acting; but the reason for such rule does not apply to this case, for the defendants were not contracting with the plaintiff, or acting in any way in relation to such custom. Plaintiff simply took from them, [179] against their will their fishing site. The Master's finding is simply to the effect that fishing sites on the Columbia River were ordinarily rented for one-third of the total catch, where the lessee furnished all of the gear.

In the interlocutory decree it was held that the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, were entitled to personal judgments against the plaintiff and its bondsmen. The Master found that the defendants were equally interested in the fishing locations. They will, therefore, have separate judgments, each for one-third the total amount of recovery and each for one-third of the total costs incurred,—each of such judgments to be limited to Four Thousand Dollars, as against the bondsmen, which, taken together,

will make Twelve Thousand Dollars, the face of the bond.

By finding No. VII, the Master found that the average price for fish for the four seasons (1908, 1909, 1910, and 1911) was One Hundred Thirty Dollars per ton, and calculated defendants' damages accordingly. In this finding, it is concluded, that the Master was in error, and that the testimony of the witness McGowan—that One Hundred Thirty Dollars was the average price for fish—although not entirely clear, was intended by the witness to apply to the year 1911. The testimony shows that the average price of fish for 1910 was One Hundred Thirty Dollars; 1909, One Hundred Twenty-five Dollars, and 1908, One Hundred Twenty Dollars. This would affect the first conclusion of law, making the value of the one hundred seventy-two tons of fish Twenty-two Thousand Eighty-three Dollars, instead of Twenty-two Thousand Three Hundred Sixty Dollars, as found by the Master. [180]

The report of the Master is, in all other respects, approved and confirmed.

Filed U. S. District Court, Western District of Washington, Southern Division. Aug. 12, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [181]

*In the District Court of the United States for the  
District of Washington, Southern Division.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIA-  
TION, a Corporation,

Complainant,

vs.

H. S. MCGOWAN, ERICK LINDSTROM and J. P.  
COYLE,

Defendants.

**Final Decree and Judgment.**

Now, on this 22d day of September, A. D. 1913, this cause came on for hearing on the motion of the defendants for the entry of a final decree and judgment herein, the complainant being represented by G. C. Fulton, its attorney, and the defendants being represented by Welsh & Welsh and Dorr & Hadley, their attorneys; and it appearing to the Court that heretofore, to wit, on the 5th day of February, A. D. 1912, an interlocutory decree was entered herein wherein and whereby, among other things, it was ordered and decreed that, for the purpose of determining the amount of damages to be assessed against the complainant in this action, the cause was referred to the Hon. M. A. Langhorne, a Commissioner of this court residing in the city of Tacoma, Pierce County, Washington, as Master *pro hac vice* to ascertain and report to this Court the amount of damages suffered by the defendants and cross-complainants, H. S. McGowan,

Erick Lindstrom and J. P. Coyle, through their having been deprived of the use of the set nets and appliances in said interlocutory decree mentioned from [182] and after the 7th day of July, 1908, the date upon which the temporary injunction was issued against the defendants in this cause, up to and until the date of said decree; and to that end, the said Commissioner should consider the testimony theretofore taken in the cause, and should hear such other and further testimony bearing upon the question and amount of damages sustained and to be recovered as the parties, or either of them, should offer; and upon the conclusion of the hearing, the said commissioner should report his findings and conclusions to this Court, together with any further testimony which may have been taken before him; and it further appearing from the report of M. A. Langhorne, the Special Master appointed in said interlocutory decree, which report is on file herein, that, in pursuance of the terms of said interlocutory decree, he did, on the 23d, 24th and 25th days of April, 1912, proceed to hear testimony upon the subject of damages as in said interlocutory decree directed, and that he heard such testimony as the respective parties desired to submit after which he duly examined the evidence which had theretofore been taken in this cause, pertaining to the subject of damages, and also the evidence which was taken directly before him as Master, and thereafter filed herein his findings of fact and conclusions of law, wherein and whereby it was found that the aggregate damages suffered by the defendants in this action was the sum of \$22,360.00, and that



the three defendants are equally interested therein, for which they should have judgment; and it further appearing to the Court that thereafter, to wit: on the 2d day of June, 1912, this cause came on for further hearing before the Court on the motion of defendants for the confirmation of the findings of fact and conclusions of law, as returned by the Special Master, and also [183] upon the exceptions of the plaintiff to said findings of fact and conclusions of law, and that the Court, having heard the arguments of counsel, and having taken the matter under advisement, thereafter duly examined all the evidence pertaining to the subject of damages which *has* taken at the first trial of this cause, and also all the evidence which was taken before the Special Master and transcribed and returned with his report, and that, after having considered all of said evidence and the law in the premises, and being duly advised, the Court did, on the 12th day of August, 1913, file herein its memorandum decision wherein and whereby it did, in all respects, approve the findings of fact and conclusions of law as returned by the Special Master, with the exception that the Court found that the damages amount to \$22,083.00 instead of \$22,360.00, as found by the Master; and it further appearing to the Court that, by the terms of said memorandum decision, it was found that the defendants are equally interested in the amount recovered herein, and it was directed that separate judgments shall be entered herein in favor of each of the defendants for one-third of the total amount of recovery to wit: one-third of \$22,083.00, and for one-third of the total costs incurred by the

defendants, and that said judgments shall also be entered against the United States Fidelity and Guaranty Company, the surety upon the injunction bonds given by the *complaint* in this cause, each judgment against said surety, however, to be limited to the sum of \$4,000.00; and the cause now coming on regularly for further hearing upon the motion of defendants for judgment in accordance with the memorandum decision aforesaid, the Court being fully advised in the premises,

IT IS THEREFORE now CONSIDERED, ORDERED, ADJUDGED and DECREED that the defendant, H. S. McGowan, shall recover in this [184] action of and from the complainant, the Columbia River Packers' Association, the sum of \$7,361.00, together with the sum of \$316.10 costs taxed herein, the same being one-third of the total costs taxable in favor of the defendants in this action; and the said H. S. McGowan shall also recover in this action from the United States Fidelity and Guaranty Company, surety as aforesaid, the sum of \$4,000.00, which amount is included in the above sum awarded him against the complainant, it being especially hereby declared that the liability of said surety and of the complainant is coequal to the extent of \$4,000.00 and no more, but that the complainant, the Columbia River Packers' Association is liable for the whole of said sum of \$7,361.00 and costs as taxed, the said amount of judgment and costs to draw interest from the date of this decree at the rate of 6 per cent per annum, and execution may issue therefor.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED and DECREED that the defendant, Erick Lindstrom, shall recover in this action of and from the complainant, the Columbia River Packers' Association, the sum of \$7,361.00, together with the sum of \$316.10 costs taxed herein, the same being one-third of the total costs taxable in favor of the defendants in this action; and the said Erick Lindstrom shall also recover in this action from the United States Fidelity and Guaranty Company, surety as aforesaid, the sum of \$4,000.00, which amount is included in the above sum awarded him against the complainant, it being especially hereby declared that the liability *if* said surety and of the complainant is coequal to the extent of \$4,000.00 and no more, but that the complainant, the Columbia River Packers' Association, is liable for the whole of said sum of \$7,361.00 and costs as taxed, the said amount of judgment and costs to draw interest from the date of [185] this decree at the rate of 6 per cent per annum, and execution may issue therefor.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED and DECREED that the defendant, J. P. Coyle, shall recover in this action of and from the complainant, the Columbia River Packers' Association the sum of \$7,361.00 together with the sum of \$361.10 costs taxed herein, the same being one-third of the total costs taxable in favor of the defendants in this action; and the said J. P. Coyle shall also recover in this action from the United States Fidelity and Guaranty Company, surety as aforesaid, the sum of \$4,000.00, which amount is included in the above



sum awarded him against the complainant, it being especially hereby declared that the liability of said surety and of the complainant is coequal to the extent of \$4,000.00 and no more, but that the complainant, the 'Columbia River Packers' Association, is liable for the whole of said sum of \$7,361.00 and costs as taxed, the said amount of judgment and costs to draw interest from the date of this decree at the rate of 6 per cent per annum, and execution may issue therefor. Special Masters' fees fixed at \$250.00 dollars—

ALL OF WHICH IS FINALLY ADJUDGED  
AND DECREED.

To all of the above and every part thereof, complainant in open court duly excepted, and the exceptions were duly allowed by the Court.

ALL DONE in open court this 22d day of September A. D. 1913.

EDWARD E. CUSHMAN,  
Judge.

Filed U. S. District Court, Western District of Washington, Southern Division. Sep. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [186]

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*In the District Court of the United States for Western District of Washington, Southern Division.*

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,

Defendants.



**Engrossed Testimony and Evidence.**

BE IT REMEMBERED, that after the above-entitled cause was fully at issue by an order of the Court duly rendered and entered on the 29th day of August, 1910, the said cause was referred to C. D. Savery, Special Examiner, to take the testimony and evidence offered and introduced by the respective parties, and when concluded to report the same to the Court for such further proceedings as the Court should determine. At the taking of the testimony and evidence G. C. Fulton, Esq., appeared for the plaintiff and Messrs. Dorr & Hadley and Messrs. Welch & Welch, appeared for the defendants.

Thereupon the following testimony and evidence was duly taken before said Special Examiner and by him duly returned and reported to the Court, that is to say:

The plaintiff, in order to sustain the issues on its part produced the following testimony and evidence:

The plaintiff by his attorney offered in evidence a certified copy of the records of the Department of the Interior relative to the proclamation of the President of the United States reserving Sand Island as a military reservation. [187]

To the introduction of this document in evidence the defendants, by their attorneys, objected upon the ground that it was immaterial and irrelevant.

Thereupon said document was received and marked as Plaintiff's Exhibit "A," and the same is hereunto attached so marked and made a part hereof.

Plaintiff, by its attorney, then offered in evidence

a certified copy of the articles of incorporation of the plaintiff under the laws of the State of Oregon.

Thereupon said document was received in evidence and marked as Plaintiff's Exhibit "B," and the same is hereunto attached so marked and made a part hereof.

The plaintiff, by its attorney, then offered in evidence a certified copy of the articles of incorporation of the plaintiff as filed with the Secretary of State of the State of Washington, and also a certificate of such Secretary as to the filing thereof.

Thereupon said documents were received in evidence and marked as Plaintiff's Exhibits "C" and "D," respectively, and the same are hereunto attached so marked and made a part hereof.

Plaintiff then offered in evidence a lease from the War Department signed by the Secretary of War to the plaintiff for Sites 2 and 3 on Sand Island.  
[188]

Thereupon said document was received in evidence and marked Plaintiff's Exhibit "E," and the same is hereunto attached so marked and made a part hereof.

To the introduction of said lease the defendants, through their attorneys, objected, for the reason that the offered evidence is incompetent, irrelevant and immaterial, and that the lease does not purport to cover any fishing rights, littoral rights, riparian rights, or any interest or right whatsoever, or to vest the lessee with any such interest or right outside of the territorial limits of the grounds or land proper. And further, for the reason that it would be impos-

sible under the law for the War Department of the United States to grant, convey or lease to these defendants, or anyone else, any fishing rights, littoral rights or riparian rights of the shore line of the premises leased by this instrument. And further, for the reason that the offered lease does not purport to cover Sand Island, or any part thereof, which is referred to in the preceding paragraph of this action. It is admitted, however, that the instrument is executed by the officers which it is purported to be executed by, and that they are the officers of the Government as represented, and that the signature purported to be the plaintiff's signature is its signature.

**[Testimony of R. A. Hawkins, for Plaintiff.]**

R. A. HAWKINS was then called as a witness on behalf of the plaintiff, who, after being sworn according to law, testified as follows:

I reside at Ilwaco in the State of Washington, and have resided there for about thirty years. I am forty-four years of age the twentieth of this month, and am engaged in the fishing business, trapping, seining, etc. I am superintending that kind of work at Ilwaco on both the Oregon and Washington waters in the [189] Columbia River, and I have been interested in the catching of salmon and fish by traps, seines, set nets, etc., for about twenty years, and am familiar with the manner in which such fish are taken in the West on the Columbia River, and have been during such times, and I have been engaged in such business myself, both trapping,



(Testimony of R. A. Hawkins.)

set net fishing and seines. A seine is ordinarily described as a drag net. At present I am in the employ of the plaintiff, the Columbia River Packers' Association, and have been in its employ ever since it was incorporated, and it was incorporated, as I understand, in 1899, on the fifth day of January. The nature of my employment is that of superintendent of fisheries of the plaintiff. The character of the fisheries operated by the plaintiff and in which it has been interested during such times is seining and trapping, and I have superintended from twenty-five to thirty traps each year, and from three to six different seining grounds. I have no seining grounds myself, but I own traps. I am acquainted with Sand Island at the mouth of the Columbia River and have been acquainted with it for about thirty years. That there is and has been during that time only one island at or near the mouth of such river and it has always been called or named Sand Island, and I know of no other island in the river bearing such name. I could not tell its acreage. I should say at the present time it is about three miles long and about one and a half or two miles wide. It is considerably larger than it was when I first knew it. It has moved and the sand has washed up and accumulated on all sides and it has grown in length and width. I do not think the main body has moved since I became acquainted with it. I think it has just merely added on. The witness was then handed Plaintiff's Exhibit "A," hereunto attached, and he stated that the island is much larger now than it was then, but



(Testimony of R. A. Hawkins.)

that it is the same island that is involved in this suit; that the island has moved further north and is more extensive. That formerly the main channel of the Columbia River was north of such island, [190] and when I first came here all of the ships came in on the north side of the island, and since that time the channel has changed to the south side. I am acquainted with Sites numbered 2 and 3 mentioned in Plaintiff's Exhibit "E," as indicated by the map attached thereto; that the map delineated thereon is the map of Sand Island, and that the Sites numbered 2 and 3 on such map are the seining grounds covered by the lease from the United States to the plaintiff. I have been acquainted with these sites since they have been laid out and for some time prior thereto. I used to operate Site numbered 3 for fishing purposes exclusively and for seining purposes in the operation of the drag seines, and I have so operated said sites ever since the Columbia River Packers' Association incorporated until such sites were leased by the Government and the Government then took possession. That Sand Island has been used for fishing purposes as long as I can remember, at least twenty years for seining, and has been used for seining purposes only. An attempt was made to drive fish traps on the west end, but they were taken out by the gill netters and there was no obstruction on the shore that I can remember of. I do not ever remember of any set nets being placed there until Mr. McGowan and others attempted to put them in. I refer to the defendants in this suit and

(Testimony of R. A. Hawkins.)

at the time complained of in this suit. Before that time I never saw or heard of any set nets being operated there or attempted to be operated. That the south shore of said island has been used for the last twenty years exclusively as seining grounds and for no other purpose excepting gill nets bothering the operations of seining considerably. They would fish in the same grounds or waters, but not on the shore. The shores of Sand Island on the south have been used exclusively for the last twenty years for the hauling of seines and the use of seines. The Government took charge about six years ago this coming spring. Before Sites 2 and 3 mentioned in Plaintiff's Exhibit "E" was leased to the Columbia River Packers' Association [191] the defendant, H. S. McGowan, had Site No. 2 and Jack Service had Site No. 3 and I think the Stensland boys had taken out the bids in their name. It was operated by drag seines. I know how these leases were obtained from the Government. The two sites were advertised and private bids were put in therefor. Such advertisements were made by the Secretary of War.

Q. Did you know the bidder for Sites numbered 2 and 3 at the time the bid was let to the plaintiff?

To this question the defendants, by their attorneys, objected on the ground that it was immaterial and not the best evidence.

A. Yes, sir. For 2 and 3 it was the Columbia River Packers' Association, Hansen & Olsen, or it may have been in the name of Chris Hansen and

(Testimony of R. A. Hawkins.)

Jack Service, and I don't know who else. Defendant Henry S. McGowan was a bidder for Sites numbered 2 and 3 at the time the premises were leased to the plaintiff. The Government in its lease generally included about 3,500 feet of the waterfront.

The soil on Sand Island is practically all sand in which grows a wild grass and a few little trees in the middle of the island. I know that the Columbia River Packers' Association paid the rental for the premises as set forth in its lease. I am acquainted with the value of seining grounds on the Columbia River and Sand Island.

Q. What is the value of the premises described as Sites 2 and 3 in this lease, Plaintiff's Exhibit "E"?

[192]

A. I would judge somewhere about \$2,500 per year.

Q. Where is the boundary line between the State of Washington and the State of Oregon as established by the decision of the Supreme Court of the United States in the case of the State of Washington vs. the State of Oregon?

To this question counsel for defendant objected on the ground that it was incompetent testimony and that the Supreme Court itself says that it does not know where it is and the witness could not be presumed to know.

A. On the north side of Sand Island.

Prior to the beginning of fishing operations in the year 1908 the plaintiff, Columbia River Packers' Association, made all necessary arrangements for the



(Testimony of R. A. Hawkins.)

purpose of conducting and operating Sites 2 and 3. We bought seines and boats and employed a larger number of men and by the time fishing operations were begun there the plaintiff had expended fully \$15,000. It had six seines and boats, two launches,, twenty-four horses and employed forty-eight men and had considerable paraphernalia. Fishing operations that year were begun on the second day of July. About the fifteenth day of June, 1911, we discovered that the defendants had placed in the waters in front of said sites immediately below the line of low water, a number of obstructions. The defendants had put in some nine buoys to which were attached wire cables and at the other end anchors, weighing all the way from 300 to a thousand pounds. The buoys were made of cedar bolts and they were probably 250 feet apart and occupied practically the entire front of Sites 2 and 3. These anchors were on the bed of the river and those on the inside you could wade out to at low water. These buoys and anchors were placed only in front of these two sites, and it was impossible [193] to operate the seines with these anchors and buoys in front of said sites or employ such sites for the purpose of operating seines thereon, and such sites are practically valueless for any other purpose. The seines are operated at that point in the following manner: You load your seines on the boats and have your launch pull it out probably 250 or 300 fathoms right out into the river, and you have four horses on the tail line and they pull that down for half a mile, prob-



(Testimony of R. A. Hawkins.)

ably, or three-quarters of a mile, and the boat brings in the head line and then they hitch the horse on and they pull it in. They take a scope of sometimes a mile. That the seines used by the plaintiff on these two sites were from 250 fathoms to 300 fathoms in length. The seines were operated generally on the ebb tide or first of the ebb and the first of the flood. Of course the tide floats these seines and they sweep the entire front and are hauled in on shore and the fish taken therefrom on or near the shore. With these obstructions that the defendants had placed in front of these premises it was impossible to operate seines. When I first saw these buoys there was nothing attached to them. I saw them about the fifteenth or twentieth of June for the first time. The next time I saw them was about two days after that, about the eighteenth. There was attached to two of these buoys a little piece of net in front of Site No. 3. I should judge it was made of seining webb about five-inch mesh. It was about 50 feet long, I would think. It was not possible to catch any fish with such a net. Regular gill net webb is necessary in order to operate a set net with a mesh of about nine or nine and a half inch and made of flax or linen twine. The net attached to these buoys that I speak of was made out of seining net. It was cotton. Fish can only be caught in a set net by gilling them, and it is impossible to gill fish in a seine or cotton webb. There was at this time a piece of gill net attached to the buoy [194] on No. 2 ground. I should judge it was about 50 to 150 feet long. It was tied on at one end only and lay

(Testimony of R. A. Hawkins.)

up and down stream. In such position it was impossible to catch fish. I am familiar with the manner in which set nets are operated. They are generally put in and tied at both ends across a stream where there is not a very strong current, as a rule, where the fish are corralled and gilled therein. When the plaintiff was ready to begin operations I received orders from the plaintiff to remove these buoys and anchors and obstructions, and they were accordingly taken out in front of said premises and placed on shore. The next day we found three or four of similar character replaced in front of the premises about the same way the others were. The main channel of the Columbia River washes the south shore of Sand Island and in operating seines on the shore of such island the main portion of the river is fished. Of course we do not get out in the middle of the channel. The reasonable cost of operating plaintiff's seining outfit at that time was close to \$200 a day. Up to November, 1908, when the Supreme Court of the United States determined the boundary line between Oregon and Washington to be north of Sand Island, the general understanding was that Sand Island was in the State of Washington. We were notified by our Fish Commissioner in Washington to purchase licenses in the State of Washington, and we always took our licenses out in the State of Washington prior to that time. After that we were notified by the Fish Commissioner of Oregon to take out our licenses in Oregon. I know what the general belief and opinion was in the State of Washington as to

(Testimony of R. A. Hawkins.)

what State Sand Island was located in, and it was the general belief and opinion that it was in the State of Washington, and this claim was made by practically all the officials in the State of Washington. I never heard anyone claim that it was in Oregon, and I never knew of the officials [195] of Oregon claiming that Sand Island was in Oregon prior to that decision. I recognize these licenses that have been handed to me and they are the licenses that the plaintiff operated under during the year 1908.

Whereupon the said licenses are offered in evidence by counsel for the plaintiff, not because we admit that the State of Washington had any authority to issue such licenses, but for the purpose of showing that the State of Washington and its officials claimed and exercised the jurisdiction over Sand Island and claimed it to be within the territory of Washington at the institution of this suit, and also to uphold the allegations of plaintiff's complaint. These licenses were numbered 2391, 2392, 2393 and 2394, dated June 30, 1908, and the same were received in evidence and all are marked Plaintiff's Exhibit "F" and are hereunto attached so marked and made a part hereof.

Upon beginning fishing operations for the year 1908 it was necessary to clear the grounds, which was done at an expense of something like \$700.

Counsel for plaintiff then offered in evidence a map prepared by the United States Geodetic Survey of the Columbia River, Sheet No. 1, entrance to Astoria.



(Testimony of R. A. Hawkins.)

This document was received in evidence and marked Plaintiff's Exhibit "G," and the same is hereunto attached and so marked and made a part hereof.

The land marked "Sand Island" represents the land in controversy in this suit, and on the south shore of that island are Sites 2 and 3. In my judgment this is a correct map of the river and Sand Island.

Q. And the boundary between the State of Oregon and the State of Washington is north of Sand Island and between that and the shore of the Columbia River. [196]

To this question counsel for the defendants objected on the ground that it was incompetent.

A. Yes, sir.

Cross-examination.

I have lived in Ilwaco for thirty years past continuously, and have been familiar with the general surroundings there all that time and have been engaged in the fishing business for twenty years, and have been employed by the plaintiff since the year 1899. I was engaged in the fishing business with Mr. Elmore prior thereto and I fished in the vicinity of Sand Island all that time more or less. Sand Island has been growing in four directions—north, south, east and west, and growing larger all the time, and it is somewhere around in the neighborhood of the same relative position that it was thirty years ago. It has moved, I suppose, a little. I could not say exactly how much; sometimes it would wash off, sometimes it would wash on. It has never dis-



(Testimony of R. A. Hawkins.)

appeared entirely. I cannot say how many miles it is now from its original location. It was a little place when it first came and it has been growing to the extent of probably a mile and a half. Of course I do not think it is two or three miles from its original location. I do not think more than one mile. It is somewhere about half a mile that has accumulated on both sides, probably a half a mile and maybe a little more. I think that part of the present island covers the same space that the old island covered, and I am sure of that. I have never surveyed it or anything like that, but I have been on it every day more or less, year in and year out, and my answer is not based on any definite measure, only by my experience on the island. I said formerly the channel was on the north side of the island and now the channel is on the south [197] side of the island. It changed a good many years ago. The tugs and ships have been going on the south side and when I first came there all the ships and tugs went up on the north side. They lay under Cape Disappointment. I think the channel changed about something over twenty years ago and the north channel practically disappeared. It is pretty shoal. It does not go dry at low tide. It is different depths at different places. In the deepest place, which is in Baker's Bay, there is probably about ten or twelve feet of water. Along in the vicinity of the island are two or three spots which they call the "North Channel" now which it would be pretty hard to get the fish boats through at extreme low tide, but at ordinary tide you can get

(Testimony of R. A. Hawkins.)

through there with your launch. I never saw it where I could see the dry land. Of course you can see little spots of sand the other side of the channel.

I cannot give in detail the amount of money that the Columbia River Packers' Association expended in making preparations for fishing there in 1908. Approximately I would say six seines were bought that year, gasoline launches and scows. We did not purchase any horses as we had some and rented some. The 'Columbia River Packers' Association had not been seining on those sites the year before but had been seining on Desdemona Sands, about four or five miles up river from Sand Island and entirely separate from Sand Island but of the same general character. When I first went over to Sand Island and saw these buoys I could not tell whether they had a State license printed on them or not. They had a number on them. I took the number off and wrote to the Fish Commissioner of the State of Washington and found that these licenses belonged to the defendants and when we got ready to seine we took them out. We just pulled them out and then the defendants replaced them. Then we took them out again. We took them out twice; just pulled them out and removed them. I gave instructions to our employees to take them out. The buoys were all below the [198] line of low tide in water from three to ten feet deep. I never saw Mr. McGowan up there. I think the first time we took out these buoys and anchors was some time about the last of June. Mr. McGowan fished Site No. 2 the

(Testimony of R. A. Hawkins.)

previous year. He had the lease for three years. I think that lease was taken out in the name of Mr. Stensland. I don't know whether in his name, but Mr. McGowan was considered the main man who was running them. Prior to that I think Mr. McGowan had a ground over there but I think it took in a part of No. 2 and some of No. 3, and he was operating a seine there *was as* also the Columbia River Packers' Association, although we had different grounds. We had No. 3 and part of No. 2. Mr. McGowan had no set nets out there prior to 1908 and I never knew of anyone else having any there. When I spoke of cleaning the grounds for fishing I mean that it was cleared of the old snags, roots and different things like that. Then there was once upon a time several years ago a party started to operate a fish trap at the lower end, and these piling were broken off and taken out by the gill netters and the same had washed away and the tops taken out and we had to hire a donkey and scow to pull these out in order to pull up our seines.

As soon as we obtained the lease we went right to work and ordered the seines and boats built and acquired everything necessary to operate seines on these grounds. We did not purchase any horses; we had some and rented others. I could not tell whether the buoys and obstructions in front of the island contained the number of the State license but I took the numbers that were painted on the buoys and wrote to the Fish Commissioner of the State of Washington and found that they were owned by the



(Testimony of R. A. Hawkins.)

defendants. I understood these numbers painted on these buoys were intended as license numbers. When we got ready to seine we simply removed all of these buoys; pulled them out; placed them on the island. We were unable to seine unless they were removed. [199] I know the Columbia River Packers' Association paid the rental named in the lease, but I did not see the check signed. We began actual seining on the ground the second day of July.

A set net is made out of eight or nine and a half inch mesh hung on a cork line and lead line and as a rule set in a place where there is no current to amount to much and where the space is confined so that the fish cannot go past. Where they do most of the set netting is where they can put the net from shore to shore and block up the stream and confine the fish below. That is generally the way they set nets. I have never run or operated a net myself on the Columbia River. I had a few set nets over on Willapa Bay, not to amount to much, but have seen a great many operated. The way they are usually held is by driving a big stake on shore and a post on the other shore and stretching the net across the stream. I never saw anyone anchor them in the river and it is not a common practice to do so. I never saw a set net anchored, I mean without driving piles. I do not think it is practical to hold a set net by anchors, that is where there is any tide this cannot be done. You might hold them, but the lead will not. It will float to the top of the water. You cannot fish set nets by anchors. You cannot hold



(Testimony of R. A. Hawkins.)

them. At this particular location there is slack tide at times. The tide rises and falls from five to nine feet daily. The distance between the line of high-water mark to the line of low-water mark on these sites varies, but it averages from 75 to 100 feet. In some places the bed drops off more rapidly than other places. Ordinarily, it is a gradual slope to the channel. The channel there is quite wide and the vessels run pretty close to Sand Island. The last time I measured from Sand Island I measured out 300 fathoms from the shore and the water was from seven to eight fathoms in depth. The principal fish caught at Sand Island is Chinook salmon, bluebacks and silversides. All [200] salmon fish of different varieties and we have different mesh for different kinds of fish. For seines we use from a four inch mesh to say within about five. Some might use a little larger, five and one-fourth. The seine is intended to take all fish that get in its way. Fish caught in set nets are gilled and the mesh must be of considerable size to get their heads in. About nine and a half inch mesh is the common size mesh used in gill nets and set nets. They sometimes fish for the smaller fish such as bluebacks and steelheads with six and a half inch mesh, but very few of these are used. A gill net is described as containing mesh between eight and nine inches accordingly as you wish it. And after you have knit it selvage it with cotton twine, both on the lead line and the cork line, then after it is selvaged you hang the cork line with floats, probably two and a half feet apart; the lead line you

(Testimony of R. A. Hawkins.)

hang with leads probably nine to eleven inches apart. It is operated by taking it out into the river and it is then thrown out of the boat. They average from 250 to 300 fathoms long and about 45 meshes deep and fish are caught therein by the gills. There is considerable difference between fishing a gill net and a set net. Where you have a set net across the stream where you can control the stream, you can fish, but you cannot if it is anchored in a body of water. The fish will come up to the gill net if it is short set, and they will probably leave, and if the net is anchored at the top and a cork line at both ends, and the current is strong it will raise the lead line and the fish will go under it. When you are coming down with the current the gill net stays down and the fish are forced to gill that way. I would not consider that the method of catching fish with a gill net and a set net are the same. There is no set nets practiced on the lower Columbia, down as far as the river at all. None of it has ever been done there.

[201] A set net and a gill net are made out of the same material and the same mesh, but they are operated differently. A set net is stationary, while the gill net floats with the current. And the cork line and the lead line in the gill net come down at the same time with the tide. I should judge that Sites Nos. 2 and 3 for fishing purposes were of the approximate value of \$5,000 per year. I do not know exactly how much fish we caught in 1908, somewhere around 100 tons. I could not say how many fish were caught on Site No. 2. We fished from the top

(Testimony of R. A. Hawkins.)

of No. 3 and drifted down to the bottom of No. 4, as a rule. I could not tell where the fish were caught. I do not know what the difference was between the two sites; I don't think there was much. The first part of the fishing season we did well on No. 3, the last part on No. 2. The practical time for catching salmon on this site begins about July first and lasts until the twenty-fifth of August, when the fishing season is closed by law. It is not profitable to fish before the first of July. I think these salmon which were caught during the year 1908 were worth somewhere around five cents a pound; five or six cents, I am not sure. I would not want to say; the prices vary and there have been so many prices and part of the season would be higher than at other times; but I should say somewhere around about five or six cents. We operated these grounds during the year 1909. In 1908 we put in close to 130 tons to 140 tons, and in 1909 we put in about 100 tons, or a little over. The price for 1909 was five and a half and seven cents, I think. In 1910 we put in somewhere around 130 tons and the price was five and a half and seven cents. These are the two extremes; that is five and a half for the small fish under twenty-five pounds, and seven cents for fish over twenty-five pounds. I could not say for sure how the average for small and large fish were, but it must be about equal, half and half. Some years it runs mostly small and others differently. [202] This year (1910) I think they are about half and half. I think it was about ten years ago that the



(Testimony of R. A. Hawkins.)

gill netters took out the trap that was driven in front of Sand Island. They took it out by force. There were about 4000 gill netters on the river and they took out this trap because it was in their way. On the 20th day of June, 1908, we began cleaning up our ground. I was instructed by the vice-president of the plaintiff to remove these buoys that were placed on said sites by defendants and did so accordingly.

Redirect Examination.

Q. You are asked by counsel for defendants concerning the number of fish caught on these grounds during 1908, 1909 and 1910. Did the Columbia River Packers' Association make any money or did it lose money in the operation of these grounds in 1909?

To this question counsel for defendants objected on the ground that it was immaterial.

A. In 1908 after the fishing season was all over I went over and asked the company how they came out, as I generally do in all my business, and they said they did not quite come out even. That was the first year we operated they didn't come out quite even.

Counsel for defendants moved to strike the above answer as not being responsive and also hearsay.

Q. Did you examine the books?

A. I had mostly to keep track of more than they did, although they had the books. I knew exactly how it was. I was not certain if we had made a few dollars or lost a few dollars, [203] and when the



(Testimony of R. A. Hawkins.)

secretary asked if they had the report made up he was told no, and he said to run over it roughly, that he would like to know.

Q. You have certainly examined it?

A. Yes, sir.

Q. Did you know of your own knowledge whether they made or lost?

A. We lost a little the first year.

Q. What about the year 1909?

To this question counsel for defendants objected upon the ground that the same was immaterial.

A. The second year we lost between four and five thousand dollars.

Q. And the third year?

A. That is this year, I think we made a few dollars.

I saw these sites shortly after the lease was executed by the Government to the plaintiff and none of these buoys were there or in front of said premises. These buoys were arranged from 50 to 60 or 75 feet from below the line of zero tide and there were two buoys on each location, one on the inside and the other on the outside; two buoys to each set net and the distance between these two buoys was about 100 feet. I think there were nine buoys on the inside and nine buoys on the outside, making eighteen buoys altogether, although I am not positive. I do not think they all had two. They might have been there in the night and gone out in the morning, because if the gill netters come along and get caught they would take them out.

**[Testimony of E. E. Woodfield, for Plaintiff.]**

Mr. E. E. WOODFIELD, a witness on behalf of the plaintiff, after being first duly sworn, testified upon interrogatories propounded to him by counsel for plaintiff, as follows: [204]

I am twenty-eight years of age and live at Astoria, Oregon, and have lived there twenty-eight years, and am a seine fisherman by occupation and have been engaged in such business for the last twelve years. I have been foreman of seining for the last five years, all on the lower Columbia River, and am familiar with the manner of handling seines in the waters of the Columbia River known as the lower Columbia River, and have been, as I have said, for twelve years. I am now in the employ of the Columbia River Packers' Association and have been so employed steadily for the last two years in the capacity of seining foreman. The duties of a seining foreman are in the nature of an overseer, seeing that the grounds are in shape and handling the crew in actual operation. I had charge of Sites 2 and 3 on Sand Island during the years 1908, 1909 and 1910 as foreman for the Columbia River Packers' Association. I had never been on the island before that time, but had been acquainted with it, known it and seen it for the last eighteen years. There is only one island by that name near the mouth of the river. I went on the island on the twentieth of June, 1908, with five men, one gasoline launch, and a team of horses for the purpose of preparing the ground and making

(Testimony of E. E. Woodfield.)

roads to haul fish over, fixing up the houses and making preparations for fishing operations, and we were ready to seine on the second day of July. We began seining on the third day of July. The reason we did not begin on the morning of the second was that they were setting out these buoys and we had orders to take them out. I always thought there were eight buoys, one at the upper end of 3, one on the lower end of Site 2, and the others were distributed between them. I have no knowledge of there being other than eight buoys. I pulled these buoys out on the third day of July. We took out five. We did so under the orders of [205] Mr. R. A. Hawkins, the witness who just preceded me. There were more than that there but that is all we needed to take out at first, and not being acquainted with the ground we did not know exactly where the lines were at the time. We measured the water when we hauled up these five, and the shoalest was four and a half feet, and I think the deepest was a little over eight feet, and were about 60 or 70 feet from the shore. The first ones were made out of large rocks and a hole bored in and a wire cable put through and a cedar bolt put down and the wire running through one end, with the numbers nailed on the bolt. The first ones weighed about six or seven hundred pounds, probably up to a thousand pounds. We could not successfully land our seines with these buoys in there. We waited, I think, until the next day, when they put in more buoys. We were seining when they were put in. Stensland was one of the men who put them in



(Testimony of E. E. Woodfield.)

and the other man, I think, was Walter Bussey. They were on the launch "Standard" owned by Mr. McGowan. We took these buoys out immediately. I had a talk with these men and one asked us what we were doing, and we said we were cleaning the grounds, and he asked if we knew we were destroying other people's property, and we told him that we did, but that we had orders to clear the grounds and he said "That is all we want to see," and went away. I took out seven buoys the second time. They were all in front of Sites 2 and 3. Such sites were valuable only for seining purposes and I do not think they were valuable for any other purpose. When I first went down I saw a net attached to one of these buoys there one or two days. One end of it was attached to the buoy and these two men were hanging on to the other end of it. It was attached to their boat. They were doubtless attempting to fish, but I don't think they could have got any fish. The Columbia River Packers' Association had on these grounds, six seines, six seining skiffs, two gasoline launches, [206] twenty-four head of horses, thirty-seven men, two cooks, a receiving scow, cooking outfit, harnesses, etc. The total value of the equipment, exclusive of horses, was between ten and eleven thousand dollars. The horses were worth about \$250 each. All of this equipment was necessary in order to operate those grounds. We maintained a crew right along of forty-six men, and we also kept twenty-four horses and all the above equipment during the entire season up to the



(Testimony of E. E. Woodfield.)

twenty-fifth day of August, and the expense per day of operating those grounds was not less than \$200. In my judgment they could not have been operated any cheaper to get the full value of the grounds. These sites that I speak of are the ones indicated on the blue-print attached to Plaintiff's Exhibit "E." The State boundary line between Washington and Oregon is supposed to be north of Sand Island.

#### Cross-examination.

All I know about the location of the State boundary is what I have heard and from maps. I have seen different maps of the Columbia River. The only map I ever saw was printed in the "Astoria Budget." It was gotten out so that persons could tell where to get licenses. This is a newspaper printed at Astoria. This is all I know about it.

The ground where these buoys were never went dry at any stage of the tide. I have fished a little with a set net at Youngs Bay back of Astoria about a mile. A set net is made out of linen twine about thirty or forty meshes deep according to the water and size of fish you want to catch. It is hung on a cork line and lead line, and tied with one end of the net on shore and the other out to a pile. I knew at the time I removed these buoys that they were put there for a set net location. [207] Their license number was on each and was marked with black printing, five or six inches high, on the floats. In 1908 we caught on these grounds over 135 or 140 tons. In 1909 a little over 100 tons, and in 1910, 135

(Testimony of E. E. Woodfield.)

tons, or a little more. We weighed the fish on the grounds at the receiving scow. This same equipment has been used on other ground, excepting the seines, they would have to be altered. The seines must be made to fit the grounds. The company had owned the boats, skiffs, and launches before the lease was executed, excepting one launch which was built new. The company has three or four other fishing grounds.

#### Redirect Examination.

There were no numbers on any of these set nets placed on the shore, or on the shore or any place except upon the buoys.

#### Recross-examination.

To use a seine successfully a man should fish when the tide is falling and try to cover as much ground as possible to fully take it in and with these set nets there with the buoys they could not cover any ground except to go out and come right in the way they went out. These set nets, I should judge, were from 300 to 400 feet apart. There were no obstructions between them. But you could not fish at all on the running tide on that space of ground. The seine was over 1500 feet long and you could not take it out and bring it back in that space, and if you had a shorter seine you might just as well not seine at all, for the reason that you could not catch any fish with it. You might, of course, catch some, but it was necessary to employ a seine as big as possible. The bigger they were the more space they covered. It took ten horses to land one of these

(Testimony of E. E. Woodfield.)

seines, four at one end and six at the other. You hitch the horse to [208] the end of the seine and drive them in shore. We lay one end on the beach and go out and come in with the line and keep hauling the line until you get both ends in and then haul in bodily. They catch in one haul all the way from nothing to 400 fish.

**[Testimony of R. A. Hawkins, for Plaintiff  
(Recalled).]**

R. A. HAWKINS was recalled as a witness on behalf of plaintiff and testified upon interrogatories propounded to him by counsel for plaintiff, as follows:

Q. I hand you a map attached to the opinion of the Supreme Court of the United States rendered in the case brought by the State of Washington, complainant, vs. The State of Oregon, defendant, decided November 16, 1908, marked "Oregon's Exhibit No. 16, C. C. Dalton and John W. Reynolds, Commissioners," and ask you to examine the island shown on that map within the heavy lines marked "Sand Island" and ask you to state whether or not that is the Sand Island referred to as containing Sites numbered 2 and 3 in the lease, and the island you have been testifying about and from the shore of which you have done the fishing referred to.

A. Yes, sir. That is the island.

Whereupon, counsel for plaintiff offered said map in evidence in the case. It was stipulated, however, between the parties that the map need not be filed but may be considered in evidence and referred to at

the trial of the cause. Counsel for the defendants made the following objection, namely: We have made no objection to the map being referred to without being filed inasmuch as it is part of the decision of the Supreme Court of the United States in the case mentioned by counsel, but we do object to it as incompetent for any purpose in this case, but it may be considered as actually in evidence and may be read at the hearing subject to the above objections.

**Stipulation [as to Ownership of Majority of Stock].**  
[209]

It is stipulated between the respective parties, as follows: It is admitted that the majority of the stock of the plaintiff is owned by citizens of the United States.

**Stipulation [as to Anchors and Buoys].**

The following stipulation was entered into between the parties to this suit, to wit:

It is admitted that the defendants put in the anchors and buoys referred to in the evidence herein, and also replaced the same from time to time as they were taken out by the plaintiff before the injunction was issued.

Upon the introduction of the foregoing testimony the plaintiff rested.

The defendants to sustain the issues on their part thereupon offered and introduced the following testimony in evidence:



**[Testimony of E. A. Coe, for Defendants.]**

E. A. COE, a witness on behalf of the defendants, after being duly sworn testified in response to interrogatories propounded to him by counsel for the defendants, as follows:

My name is E. A. Coe and I reside at Svensen, Oregon. At the present time I am in the mercantile business, but for a number of years I was a professional photographer. This picture that I have in my hand was taken from the hill back of Fort Columbia, State of Washington, looking towards the mouth of the Columbia River. I took it in the month of May, 1909.

Counsel for defendants then offered the photograph which the said witness identified, in evidence. To the introduction of the same in evidence the plaintiff by his attorney duly objected on the ground that the same was immaterial and [210] irrelevant and not within the issues.

Whereupon said photograph was received in evidence and marked as Defendants' Exhibit No. 1, and the same is so marked and hereunto attached and made a part hereof.

This photograph that I have in my hand was taken by me on the fourth day of July, 1909. Sand Island is indicated on said photograph by the letter "x" in red ink. The Washington shore is indicated by the letter "a." I stood at Scarboro Hill the time the photograph was taken and it was at a stage of low water. The photograph shows the sands showing through the water. You can see the light spots.

(Testimony of E. A. Coe.)

The water is a few inches or a few feet deep; the dark spots show the shoals. At low water a man might, if he had rubber boots on, walk from the shore of the State of Washington to Sand Island, and I have done it, that is, I have walked across here (indicating), but not the entire distance. We took a skiff to go out to Sand Island and had to pull the skiff over the mud and sand out there, and there was no spot in it that I could not have walked with rubber boots on without getting over the tops of the boots. This was on the fourth day of July, 1909. We started from Chinook in the State of Washington. The place I refer to is Sand Island, in the Columbia River, and Chinook is on the mainland, in Washington.

Counsel for the defendants then offered the witness another photograph, which the witness identified and stated and said:

I took it May 21, 1909, at the same time the other was taken. It is correct, that is, as correct as possible to make a photograph and show the scene. It was taken from Scarboro Head on the high land near the shore of the Columbia [211] River, in the State of Washington. The little village is shown on this map; so is Chinook, and it shows the Columbia River. Sand Island is also shown on this photograph, being at a spot marked "x" in red ink. At the time I took this photograph it was low tide.

As I stated a few minutes ago, this picture was taken at the time I started across the Columbia River from Chinook to Sand Island and shows the same

(Testimony of E. A. Coe.)

thing, only that this picture is taken on a large scale. It is the same as the other photograph but on a larger scale. I certainly think a man could walk from the Washington shore to Sand Island at low tide. I am satisfied he could from what I stated a few minutes ago. We took a skiff and went out there and picked our way through these places, and had to walk from here to here (indicating). We walked back and forth, and I know we joked at the time about walking from Oregon to Washington.

Thereupon counsel for plaintiff offered the photograph to the witness just testifying in evidence. Counsel for the plaintiff then and there objected that it was immaterial and irrelevant and not within the issues.

Thereupon said photograph was received in evidence and marked Defendants' Exhibit No. 2, and the same is hereunto attached so marked and made a part hereof.

I am not interested in the result of this action. I came here at the request of the defendant, Mr. McGowan.

#### Cross-examination.

At the time I took this photograph it was between the hours of seven and nine o'clock at an exceedingly low run out. I think the tide table gave below zero tide. I made the picture when I was asked to make it. I had nothing to do about the [212] selection of the time. The day and date was set for me. I did not attempt to cross from Chinook to Sand Island on that day and neither did anyone attempt to travel

(Testimony of E. A. Coe.)

from Chinook to Sand Island at that time. It was on the fourth day of July that I went from Chinook, Washington, to Sand Island, Oregon. Chinook is northeast from Sand Island, considerably more east than north, and is supposed to be in the neighborhood of a mile and a half or two miles. Guessing at it, it is from between one to two miles. Three of us started in a launch about twenty-five or twenty-six feet long, and couldn't make it, and then took a flat-bottomed skiff along. We couldn't get along with the launch. Making the trip across we rowed the boat probably a quarter of the way. The boat would float in six or eight or ten inches of water. The rest of the distance we walked. I never knew of anybody walking between said places without a boat, or making any attempt to do so. No one would be foolish enough to attempt the trip without a boat, although I think they might make it.

#### Redirect Examination.

From what I saw and observed and from my experience, I think it would be possible for a man at an ordinary low tide to walk from Chinook to Sand Island.

#### [Testimony of J. F. Ford, for Defendants.]

J. F. FORD, a witness on behalf of defendants, after being first duly sworn, testified in response to interrogatories propounded by counsel for defendants, as follows:

I am forty-nine years of age; reside at Ilwaco, Washington. I am a photographer by occupation



(Testimony of J. F. Ford.)

and have been engaged in such business for sixteen years. [213]

Here witness was handed a photograph. (Defendants' Exhibit 3.)

I took that photograph in May, last year, and it is a correct picture of the view. It was taken from the center of the bluff called "Cape Disappointment" at Fort Canby, in the State of Washington, and is a picture of the island at the mouth of the Columbia River, and takes in Scarboro Head and Sand Island out to the ocean view.

Counsel for defendant then offered said photograph in evidence. To the introduction of which counsel for plaintiff then and there objected on the ground that the same is incompetent, irrelevant and immaterial and not within the issues.

Whereupon said photograph was received in evidence and marked Defendants' Exhibit No. 3, and the same is hereunto attached and so marked.

I have marked on this picture "Sand Island," also "Scarboro Head" and "Cape Disappointment," and it was from these points I took the picture. Scarboro Head is in the State of Washington, and at the time I took this picture it was low tide. Sand Island is something between two and three miles from Scarboro Head right west. When I took this photograph I was standing in the middle of the bluff at Cape Disappointment in Washington. I took the top of these trees and rocks on the same bluff as I took this. I lose the rocks and catch the sand. I pointed the camera east and took a view of Sand

(Testimony of J. F. Ford.)

Island. I took each photograph separately. Photographs numbered 1, 2, 3 and 4 I took from the same position. Numbers 5 and 6 I moved to a second point on the bluff by the lighthouse and this gives you a view of Sand Island, Scarboro Head and Cape Disappointment looking east. Number 2 is changed two degrees from the southeast from number 1. Number 3 is a few degrees further around to the southeast, and number 4 I would say directly south from [214] Cape Disappointment showing the end of the jetty, and number 5 a little more to the southeast, and number 6 looking west from the lighthouse, and number 7 would be looking northwest. And these views make a continuous connective view of the premises included within said territory and make one panoramic view thereof. (Here witness was handed Exhibit No. 4.) I took this picture on July fourth, the date written on the back thereof. It is a correct view, shows Sand Island to the south, Scarboro Head to the east and looking to the southeast, from the inner side of Sand Island at what is called the bend looking out to the southeast.

Thereupon counsel for defendants offered said photograph in evidence, to the introduction of which counsel for plaintiff objected on the ground that the same is incompetent, irrelevant and immaterial and not within the issues.

Whereupon said photograph was received in evidence and marked Exhibit No. 4, and the same is hereunto attached and so marked.

When I took this picture I was possibly a mile and

(Testimony of J. F. Ford.)

a half northwest of the east end of Sand Island. I pointed the camera southeast and we took the channel at low water. The people shown in this photograph are some boys playing ball on the sands between the island and the State of Washington in the channel. It was not hardly dry there, there was about three inches of water. The boys went out with their baseballs expecting to play ball as the sands go dry, but a little wind kept some water on the sands that morning, so they were wading about. The sands were bare north of us at low tide. We waded in this little channel that was left, in the three inches of water. I am acquainted with Sand Island and know it is the one mentioned in this suit, and it is the only island there known as Sand Island. South of this island it is deep water all across the river, and fishing, seining and gill netting [215] are done there. At low tide it is simply a mud flat island to the high land.

Cross-examination.

I took the picture, Defendants' Exhibit 4, about nine o'clock in the morning. Exhibit No. 3 about the same hour but at a different time. The width of the channel between Sand Island and Scarboro Head is close to two miles.

**[Testimony of G. B. Hegardt, for Defendants.]**

G. B. HEGARDT, a witness on behalf of the defendants, after being duly sworn, in response to interrogatories propounded to him by counsel for defendants, testified as follows:

My name is G. B. Hegardt. I am a civil engineer



(Testimony of G. B. Hegardt.)

by profession and have been actively engaged in that business for the last thirty years. I worked twenty-four years for the United States Government in the capacity of an engineer on the river and harbor improvement and fortification works. I worked first in Illinois seven or eight years and the last sixteen years at Fort Stevens, from 1880 to 1905. Fort Stevens is at the mouth of the Columbia River. I am acquainted with Sand Island and have been acquainted with it since the fall of 1880. I was engaged in such work making numerous surveys for the Government of the United States in that vicinity. Sand Island is a body of land lying between the Washington and Oregon shores, the east line being about two miles west of Fort Stevens.

Thereupon counsel for defendants offered in evidence a plat for identification and the same was received and marked as Defendants' Identification No. 5, and the same is hereunto attached and so marked.

This map is from June, 1908, to the present time. Sand Island is marked in black and this survey was made in June, 1907, and the island was in the same position in 1908. The change [216] is very small. At that time there was no north channel in 1908.

**Stipulation [That Plaintiff Has an Objection to Certain Questions, etc.].**

It was here stipulated and agreed between the parties that the plaintiff has an objection to all questions touching the present and past locations of Sand Island, and also the question as to whether or not there is a channel between Sand Island and the



Washington shore and all matters relative thereto and all questions propounded to any witness relating to such channel on the ground that the same is incompetent, irrelevant and immaterial and not within the issues, and it is not necessary to note such objections, the same being preserved without repeating same.

The reason the island is in practically the same position is because at low water there is a continuous sandspit between Sand Island and the Washington shore. It is dry then and no channel exists, and this was apparent in June, 1908. And since that time the conditions would not be as favorable for a channel being between the island and Washington as in 1908, because the shoaling is continually going on, continually increasing. I suppose at high tide a boat could come and go in the channel between Sand Island and Washington, that is, boats of light draft could come and go out. Of course, it is impossible at low water or even at mid-tide. There is only one main channel in the Columbia River and that is south of Sand Island. On this map the mid-channel line of 1905 is shown by the continuous black line marked "1905 channel line" on this chart (Defendants' Identification 5) and extends from the sea to Astoria. The main ship channel at the present time is practically on the same line as indicated on the line marked "1905 channel line." Sand Island is not in the same place in the Columbia River that it was in 1854. It has moved considerably north and west. Its movements [217] were gradual, caused by erosion on the south side of the island and accretion on the north side of the island. Sand Island as situated

is entirely north of any channel that is or can be used or employed for boats or vessels or water craft plying such waters. There are, of course, two kinds of boats, sea-going vessels and river steamers that might navigate the waters. As far as sea-going vessels are concerned, I don't think that the north channel of Sand Island has been used since 1875, and in any case not since 1878 or 1879. This map, marked Identification No. 5, is called United States Coast Geodetic Survey. This is prepared from surveys made by the United States engineers as to hydrography. The survey was made in June, 1907, by U. S. engineers. I prepared this map for Mr. McGowan showing the position of the present channel lines with the channel line which existed in 1854. I have marked on this map the boundary line as claimed by Oregon and I took it from the official records and I also put on this map Sand Island in 1854, and it is correctly located from United States survey made at that time. The north channel at that time as shown on this map in red and marked "north channel line, 1854," starting from the ocean and coming easterly and north of Sand Island and joins the main channel directly opposite Fort Stevens. I also placed on the map from the official survey chart of the Coast Geodetic Survey of 1874, the north channel of 1854 and the lines on this map (Defendants' Identification No. 5) are correct and made from the Geodetic Survey of the United States of 1854, and it is the same map that was prepared by the State of Washington and used in the suit between the State of Washington and the State of Oregon to determine the boundary line be-

tween the two States, and the testimony in that case was taken during the year 1906 and I understand this action did not arise until three years later. Since 1906 the [218] changes upon Sand Island have been very small. Since the construction of the jetty and building up of the spit, the changes have been very small, but there are some changes, eroding on the south and building up on the northwest.

Thereupon counsel for defendants offered in evidence the map that the witness had been testifying about. To the introduction of which the plaintiff by its attorney then and there objected, upon the ground that the same was immaterial, incompetent and irrelevant and not within the issues.

Whereupon said plat was received in evidence and marked Defendants' Exhibit No. 5, and the same is hereunto attached so marked.

I stated that Sand Island as given on this plat was made from surveys of the United States Government taken in 1907. There was only one channel in 1907 in that vicinity. The present, or 1907 channel, is about due south of Cape Disappointment, about a mile south of the 1854 channel, and the two channels meet at Fort Stevens. The north channel has disappeared and is now covered by Sand Island and mud flats. This north channel disappeared by encroachment of Sand Island and the filling up of Bakers Bay with sediment and sand washed over Sand Island from the spit and the channel, and also from sediment coming down the river. Sand Island as it existed in 1854 was nearly a mile and a half south at the eastern end and about three miles and a half at



the northern end of the present island, that is, the present island at its northwest end is three and a half miles north of the Sand Island in 1854. The same island in 1854 was south of the north channel line of 1854 and the Sand Island that existed in 1908 and which exists now is entirely north of the present channel in the Columbia River. Sand Island as it exists to-day does not cover [219] any part or portion of the territory, State or ground that was occupied by Sand Island in 1854. The present Sand Island is entirely separated or away from the position of Sand Island in 1854. There is a deep channel between it having as high as sixty feet of water and one mile wide. This channel as it now exists is entirely south of the present existing Sand Island. In 1884 the channel was north of Sand Island. The Sand Island as placed on this map and marked "1854" in red, was placed there by me and was made from the United States Coast and Geodetic Survey of 1854. The blue line marked on this map was placed there by me, that is the blue line marked "boundary line" as claimed by the State of Oregon.

**Stipulation [as to Defendants' Exhibit No. 6].**

It was here stipulated between the parties that the authenticity of this map is not questioned.

Thereupon counsel for defendants offered in evidence said map, to which the plaintiff, by its attorney, then and there objected upon the ground that the same is immaterial, irrelevant and incompetent, and not within the issues, although it is not questioned that it was made by the United States Geodetic Survey.



(Testimony of G. B. Hegardt.)

Whereupon said plat or map was received in evidence and marked Defendants' Exhibit No. 6, and the same is hereunto attached so marked.

Thereupon counsel for defendants offered in evidence another map, Defendants' Exhibit No. 7, which was received in evidence and marked Defendants' Exhibit No. 7, but counsel for plaintiff objected to the introduction of the same upon the ground that the same is immaterial, incompetent and irrelevant and not within the issues, but does not object to the map that [220] it was not proven, its correctness not being denied.

(G. B. HEGARDT continuing:)

This map was made by the United States engineers and compiled from records actually made. The soundings indicated on this map are the soundings taken by the officers of the United States Geodetic Survey and the figures refer to low-water datum plane. The soundings are expressed in feet and show the depth of the mean of the lower low water. This means that the soundings taken at any time were reduced to the datum plane established by the United States Geodetic Survey and the figures are given in feet. The reason there was no soundings north of Sand Island is because it was not covered by the survey. I think there was no necessity for a survey there for the reason there was no water that could be used for navigation, and it was not necessary to go to the expense of making a survey there. As a general statement, I would say that at low water there is no channel existing between Sand Island and the

(Testimony of G. B. Hegardt.)

Washington shore, and this was apparent in June, 1908, and if there has been any change since it would be that the depths would be getting less, that is the tendency.

Counsel for defendants then offered another map in evidence. To the introduction of which the plaintiff, by its attorney, objected upon the ground that it was immaterial and irrelevant and not within the issues, but made no objection as to its authenticity or correctness.

Whereupon said map was received in evidence and marked Defendants' Exhibit No. 8, and is hereunto attached so marked. [221]

(G. B. HEGARDT continuing:)

This map, Exhibit No. 8, is a map made and prepared by the United States engineers, upon which I have put in red what I claim to be the present location of Sand Island, also the words "the low-water line of Sand Island from 1910, shown in red, is from United States Engineer Department survey hereto attached of the mouth of the Columbia River, June 1910." The paper referred to there is Defendants' Exhibit No. 7, attached hereto. In showing the present location of Sand Island on this plat (Defendants' Exhibit No. 8) in red, I took the data so as to form Defendants' Exhibit 7. I have been making surveys in the vicinity and around Sand Island since 1888 and in Bakers Bay and the mouth of the river from the bar to Astoria.

Starting at the beginning the first record of any survey of Sand Island by the United States Govern-

(Testimony of G. B. Hegardt.)

ment is the survey of 1839; it is shown as Sand Island, and is bare at low water. That is our first record, and from that on Sand Island has increased in elevation and size. Its location in 1839 was well south of where it is now, probably two miles south of the present island, and since that time its movement has been gradually to the north. Taking the center of the present Sand Island and compared with the location of the center of Sand Island in 1839 the distance is probably about three miles north of the location of 1839, and it is to the west also, that is to the north and west. The present Sand Island did not occupy any part or portion of the space or territory of the original island. There is a space of practically two miles between the location of Sand Island in 1839 and its present location. There is a channel between them. The present ship channel is between the 1839 location and the present location. This movement has been gradual by building up on the north and breaking away on the south, that is, the washing was entirely on the south, as a rule. [222]

I am, of course, familiar with the ships and vessels that are engaged in trade and commerce and the only channel used or employed by such ships, or that could be employed by such ships, was south of Sand Island and between Sand Island and the Oregon shore, and it was and would be impossible for such vessels to navigate the waters between Sand Island and the Washington shore at any stage of the tide. The average rise and fall of the tide is counted as seven feet and a half. The tides in the winter-time are as



(Testimony of G. B. Hegardt.)

high as twelve feet above low water in storms, but the average is seven and a half feet, and it is about the same at Astoria and about the same at Ilwaco in the State of Washington; a very little difference. The depth of the water at the present time where Sand Island was in 1854 is between sixty and seventy feet, and this was true in 1908. South of Sand Island as it is now, the water in the channel is from sixty to seventy feet and north of it at low tide it is practically dry from the island to the mainland in the State of Washington.

In making charts the officers of the Geodetic Survey of the United States use as their basis the low-water plane, the high water not being given for the reason that low water is a constant factor in tidal waters and rivers, and it is based upon the records kept from ten to one hundred years, while the high water is a variable quantity and varies from year to year and from season to season, so that the low water is adopted, and all soundings made under the authority of the Geodetic Survey refers to low-water datum and all rises of the tide. The seven and a half foot tide I just referred to, is above low-water datum plane. Now the average between high low water and low low water is generally called zero tide. For instance, you have here three feet above zero and some neap tides two feet above, and you take the average of all low water and call that the average. This is the harmonic plane that is adopted. [223]

Cross-examination.

Q. Pursuing that question of the datum, you speak



(Testimony of G. B. Hegardt.)

of lower low water. What do you mean by that; is that below what is known as zero tide referred to by the Government tide tables, or do you mean zero tide?

A. Zero tide is the average of low low waters.

Q. Then when you speak of zero tide and lower low waters, you mean the same thing?

A. In this particular case it is lower low waters.

Q. Is that zero?

A. That is what is accepted as zero.

Q. Then in going over the tide tables prepared by the Government, wherever it is referred to as zero tide, that is lower low waters?

A. Yes, sir; that is the mean of the lower low waters. I am well acquainted with Ilwaco and have been for some time. There are railroad docks there. At least there were some, and I suppose they are still standing. I do not know the population of the town of Ilwaco, and I suppose people there are employed in navigating the waters between Sand Island and the Washington shore. I suppose there are gasolene launches and during the fishing season they are probably plentiful. At high tide a great many sail-boats and launches are navigating such waters. I do not think any stern wheel boats navigate these waters, but these waters afford quite a traffic for fishing boats, gasolene launches and sail-boats in the fishing industry. There was very little difference in the condition of the channel, if any, between Sand Island and the Washington shore in 1906, excepting that there was a general filling in of the whole of Bakers Bay, and this filling in has been quite rapid of late.

(Testimony of G. B. Hegardt.)

It has been going on prior to 1906 so that anyone can see that it is only a question of time when there will be no water between Sand Island and the [224] Washington shore. I was the consulting engineer for the State of Washington in the suit brought by that State against the State of Oregon to establish the boundary line between these two States. I was employed by the State of Washington and I gave my testimony in that case. I stated all the facts I had to my knowledge in order to establish the contention of the State of Washington, and it was established in that case that the water was very shoal between Sand Island and the State of Washington, which is the same testimony had there as I have testified here. There is practically no channel between Sand Island and the State of Washington, and all such matters were duly presented to the Supreme Court of the United States at the hearing in that case, and practically all that I testified to in this case was shown in that case. The conditions have changed appreciably since that time; I should say that on the inside of the island I think the water is much shoaler, at least two feet shoaler. I am not prepared to say, however, whether it has increased in the same proportion in the last two years as it had in the two years preceding, but in the case above referred to, State of Washington vs. State of Oregon, it was shown that all of that territory covered by the waters north of Sand Island were shoaling very rapidly.

Q. And the Supreme Court of the United States determined the boundary line between the State of

(Testimony of G. B. Hegardt.)

Oregon and the State of Washington accordingly as delineated on this map by that blue line marked "boundary line as claimed by the State of Oregon"?

To this question counsel for the defendants objected upon the ground it was calling for a legal conclusion.

A. Yes, sir. [225]

Sand Island has always been an island and its identity has always been complete in one solid body and it has always been known as "Sand Island." It has never washed away except it has gradually washed away on one side and filled up on the other. Between Sand Island and the Washington shore there are many pound net fish traps. These are constructed by driving a row of piling in the bed of the river, and it is a disputed question as to whether or not these traps have in any manner contributed to the building up of the sand in the north channel. Of course, where there is silt carried in suspension in the river and meets an obstruction it is likely to be deposited. There are three or four hundred of these traps, but I do not think that these traps are the sole cause, not the principal cause of the shoaling between Sand Island and the Washington shore. In my judgment the principal cause is substantially as follows: The principal deposit is by sand washing over the spit and carried in suspension and forced over by the flood tide into the neutral water, and more sand is carried in suspension than is carried down by the river. It is the sand that is carried by the flood waters into the neutral waters, and it is simply the law of nature



(Testimony of G. B. Hegardt.)

which is the main contributing cause. Of course, these innumerable traps are an incident. The natural tendency for that place to shoal is caused by the current deflecting south and making a spit in waters where the current is slow, or neutral most of the time.

#### Redirect Examination.

The Government of the United States has been engaged in building a jetty at the mouth of the Columbia River, and I think that these jetties are responsible for most of the filling in in Bakers Bay between Sand Island and the Washington shore, because the place where the wave action takes place is mostly confined [226] between Sand Island and the Washington shore, because the place where the wave action takes place is mostly confined between the end of the jetty and Cape Disappointment, and would not have time to overflow elsewhere, but comes into Bakers Bay and fills it up, and that is the reason. The O. R. & N. found it necessary to abandon their boats to Ilwaco on account of the shoaling of the waters and they now have their station at Megler on the Washington shore. I think the station was built some time in 1906, but I am not sure.

Q. Speaking now with reference to the north channel, state whether or not that has gradually worked to the south; in other words has the water in the north channel been gradually going south until it is now south of Sand Island?

Mr. FULTON.—That is objected to as a conclusion.

A. I would say that where the north channel was



(Testimony of G. B. Hegardt.)

before, of course, there was a channel or space through which the water would flow. The river requires a certain cross-section to take care of the volume of water and when the north channel occupied by the old north channel was filled up, it was natural that the body of water which flowed through that space would move south where it was unobstructed, so that the water really moved south of Sand Island.

Q. Until it is now where?

A. The place marked by the 1905 channel line, on Exhibit 5.

Mr. DORR.—What you mean then is that the water has shifted and gone south instead of the land moving?

A. Yes.

(By Mr. FULTON.)

Q. Then, you have now evolved the doctrine that because the channel has gradually grown shallower and unable to accommodate the water that formerly went through it, that [227] consequently the water goes in another direction and that constitutes the channel.

A. When that question was asked before I did not understand it with reference to a channel, but when they mentioned the water, it is plain, that if there was no space for the water to flow through, it was forced in some direction where it was unobstructed, and that was south, the only direction where it was unobstructed.

Q. Then it would naturally follow that if the same volume of water was in Columbia River when the

(Testimony of G. B. Hegardt.)

major part flowed through the north channel, and the north channel became shallower, more water would run in some other place? A. Yes.

Q. But it would not necessarily follow that the north channel had shifted down there, but simply that the other channel had widened sufficiently to accommodate the water, wouldn't it?

A. The channel would have to widen and move sufficiently to accommodate the water.

Q. Simply the water formerly running through the north channel is now accommodated by the south channel.

A. For the reason that the old north channel is now occupied by sand.

Q. The south channel has always been in existence and it sufficiently enlarged itself to accommodate the volume of water that formerly passed through the north channel?

A. It simply forced the north channel out of existence.

Q. But it did not change the south channel to the north channel did it?

A. In this way that where it was formerly a channel is now occupied by the island and the channel moved with it. [228]

Q. But you don't mean to argue that because the south channel widened sufficiently to accommodate the waters occupying a former channel, that there-upon the south channel was pre-empted by the north channel?

A. No, it combined with the north channel.

(Testimony of G. B. Hegardt.)

Q. Which one is the south channel now; is it the north channel or the south channel?

A. One is the main channel.

Q. It is still the south channel, only it is larger?

A. Yes.

(By Mr. WELSH.)

Q. Is there any north channel now?

A. No, that is out of existence.

Mr. DORR.—Q. And both channels are running through the south part of the river?

A. Yes.

Mr. FULTON.—Q. You mean that the water that formerly ran through the north channel is now running through the south?

A. Yes.

Mr. WELSH.—Q. The north channel having shoaled up?

A. Yes, disappearing and being forced out of existence.

[Testimony of H. S. McGowan, for Defendants.]

H. S. McGOWAN, a witness on behalf of defendants, after being duly sworn, testified in response to interrogatories propounded to him by counsel for the defendants, as follows:

My name is H. S. McGowan. I am one of the defendants in this suit. I am forty-four years of age and reside at McGowan, Pacific County, Washington. I was born there and have resided there most of my life. I am acquainted with the other defendants, J. P. Coyle and Erick Lindstrom. I have known Sand Island so called [229] since the time of "Great

(Testimony of H. S. McGowan.)

Republic" wreck, which, I believe, was in the year 1879. This ship was wrecked on what is called the Republic spit, a body of shoal water that is extremely rough and exposed off the south—southwest of the main body of Sand Island. I am engaged in the salmon business, both packing and fishing. We operate at Ilwaco, Washington, McGowan, Washington, and Warrendale, Oregon, the latter place is on the upper river, and the other two are on the lower river in Pacific County in the State of Washington near the mouth of the Columbia River. I have been engaged in such business since about 1882 or '82 or '4, and associated with me in such business are my brothers and father. It is a corporation known as P. J. McGowan & Sons. My father's name is P. J. McGowan. He became engaged in the fishing business at McGowan about 1852. We did not begin canning salmon, however, until 1884, and myself and brothers have practically grown up in the business. I have fished on the south side of Sand Island prior to 1908. The first time I fished there was along about 1896, with traps, and filed notice; that was on the southwest side of the island in the channel that existed there at that time, between the island and Peacock spit. Then it was called the Oklahoma channel, and there were a great number of traps in there and we operated some along with other people. That channel finally became obliterated by the encroachment of sand from Peacock spit and Republic spit, and was gradually filled up. Peacock spit extends from the shore around the environment of Cape Disappoint-



(Testimony of H. S. McGowan.)

ment and Fort Canby, while the Republic spit was outside to the south of Sand Island. The Republic spit was originally a wide shoal that was submerged at all times, and later on some portions of it came up above low water and moved off by the force of the sea towards the north and east, and two or three detached portions came out of the water that have finally become attached to Sand Island. I am familiar with the [230] regulations of the War Department with reference to permitting fixed appliances to be erected and maintained in the lower Columbia River. The War Department drew lines out there to the south and west of the island on both sides running easterly from the Republic and westerly and north-westerly outside of which lines they did not design to permit fixed structures, which in the fishing business would primarily include fish traps, but inside that line under the ruling of the Department they would permit it. This line was generally known as the fairway line and I was inside of that fairway line. I should explain, probably, that inside of that fairway line, as you call it, no permits were required from the War Department. The War Department through its engineers established a line outside of which fixed appliances were not permitted to be erected, but inside of such line no permit was required. I began fishing there along about 1901, I think it was; it may have been 1902, one of those years, with drag seines on a fishing site we purchased from other parties adjacent to where the "Great Republic" wreck was located. I think it was in August, 1901, we pur-

(Testimony of H. S. McGowan.)

chased such site from J. J. Brumbach and Son or J. J. Brumbach individually, I am not entirely clear. We bought from them a seining fishery or seining right. I have with me the bill of sale from Brumbach to McGowan and Sons transferring to McGowan and Sons such fishery and right.

Counsel for plaintiff admitted the execution of this document and the recordation of the instrument accordingly as shown thereon.

Thereupon counsel for defendants offered said bill of sale in evidence together with the certificate of record thereof, endorsed thereon. To the introduction of which the plaintiff by its attorney then and there objected upon the ground that the same [231] is incompetent, irrelevant and immaterial, and for the reason that the premises sought to be transferred were on a military reservation belonging to the United States, but does not question the execution of the instrument or the sufficiency of the proof thereof.

Said instrument was received in evidence and marked Defendants' Exhibit No. 9, and the same is hereunto attached and so marked.

(H. S. McGOWAN continuing:)

The location referred to in this bill of sale is on Sand Island, or rather it is on the shore of the Columbia River on the island, but I do not know whether it is a military reservation of the United States or not. I know the Government claims it as such, and so far as my memory goes, I understand the Government has always made that claim. J. J. Brumbach who signed the document was a private citizen and

(Testimony of H. S. McGowan.)

held no official position at that time.

After acquiring the above document we operated a fishery there for catching salmon fish. We built some temporary camps for housing a crew of men and horses. In the first place we operated from one to two scows. We also built a roadway and a small sort of a dock landing at the end of it. The Government made no objection to any thing we did there, at least not at the time we purchased it, or for some years after, one or two years after, I believe. During all the time we operated there we obtained our licenses from the State of Washington. The original licenses were gotten from Mr. Brumbach. He had obtained these from the Washington Fish Commissioner, and after that we secured licenses to ourselves directly from the Fish Commissioner of the State of Washington. I have in my possession the licenses issued to Brumbach. (Witness produces two fish licenses, one numbered 1476, dated July 17, 1901, and the other 1562, dated July 27, 1901, [232] issued to J. J. Brumbach and signed by A. C. Little, Fish Commissioner of the State of Washington.)

Thereupon counsel for defendants offered said licenses in evidence, both of the licenses themselves and the endorsements which appear on the back of the licenses. To the introduction of which in evidence plaintiff by its attorney then and there objected, upon the ground that each of said licenses were incompetent, immaterial and irrelevant.

Whereupon said licenses were received in evidence



(Testimony of H. S. McGowan.)

and marked Defendants' Exhibit 10, and the same are hereunto attached and so marked.

(Witness continuing:)

From that time on to this date we have held fishing licenses for those waters from the State of Washington every year. This fishery described in Exhibit 10 has always been termed the Brumbach fishery. It began at a point outside the shore of Sand Island, probably four hundred feet westerly from the eastern boundary of what is commonly now termed Site No. 2, and running thence westerly along the shore for approximately a distance of 3000 feet to a point west of the "Great Republic," and it extends out into the river to the limits of the ordinary nets that had been used in fishing. These nets were of various lengths running from about 200 fathoms to 250 fathoms in length. Of course they did not extend out into the water that distance. A 250 fathom net would probably have an extreme sweep out into the river of maybe 900 or a 1000 feet. I used this fishery constantly and continuously each year and season and until 1908. This was known to the plaintiff and to everybody in the country who was in the fishing business, and particularly to the plaintiff. One of the plaintiff's main witnesses, Mr. Hawkins, certainly knew it, because I have seen him there frequently on the site when we were operating [233] probably not every year, but over there frequently looking over the fishery and seeing what was caught, and I know it was a matter of common knowledge that everybody knew we owned the Brumbach fishery. Brumbach



(Testimony of H. S. McGowan.)

had operated this fishery for two seasons before he sold it to us. Mr. Brumbach located this fishery upon the ground one or two years before we bought it from him.

The Fish Commissioner of the State of Washington issued to me set net licenses for the year 1908 and these I now have in my possession. They are dated April 15, 1908, and issued to myself. I have two. My codefendants have similar licenses issued to them. These I also have with me. Erick Lindstrom has three and J. P. Coyle has three. Each are dated April 15, 1908, and we had possession of these licenses in June, 1908, and have never transferred them, and they have never been sold. We all located these set net licenses on the fishing grounds on the sixteenth day of June, 1908, and were located by anchoring buoys at each end of the ground covered by each license and fastening the license number to the buoys. The buoys were held in place by means of stone anchors, that is they were stones with holes drilled in; stones probably weighing 300 pounds, and through the holes in the stones wire cables were put and clamped on; wire cable probably 20 or 25 feet long, or 30, and on the other end of the wire cable were fastened suitable cedar buoys, probably four feet long, and about eight or ten inches in diameter, and on these buoys were fastened the license numbers. These license numbers were in black figures on light background; the figures were about seven inches long. There were two buoys to each location and these buoys were located, of course, at the place we intended to

(Testimony of H. S. McGowan.)

occupy for our set nets. All of these buoys were handled in the same manner, and the licenses for each of said sites were attached as I have heretofore indicated. We were working together to a large extent. I know that [234] this was the customary method of anchoring set nets and it was the only practical method, and I was intending in good faith to occupy these locations with set nets and I obtained these licenses for that purpose. The reason I did not obtain licenses from the State of Oregon was that the property was within the State of Washington and the rights were in the State of Washington so far as I know. That was the general understanding. Everybody acted upon that assumption, both private individuals and public officials. I did, however, obtain four licenses from the State of Oregon, and I have these with me. They are numbered O-142, O-143, O-144, O-145. I got them simply so that there would not be any question as to our rights in the State of Washington or the State of Oregon in operating my fishing rights on Sand Island. I knew that there was a controversy existing between these two States over the boundary line and I obtained these licenses accordingly as a protection so that I would have licenses from whichever state that should prevail. These licenses were issued to me on the dates they purport to bear, and I have never transferred them. I had these Oregon licenses merely to protect my rights in fishing there the best I knew how. After the defendants Lindstrom and Coyle and myself had anchored the buoys, I have just men-

(Testimony of H. S. McGowan.)

tioned, I received a call from Mr. Bagnall, Assistant United States Engineer of the Columbia River District, and he informed me that he was investigating a complaint that had been made against me for obstructing navigation.

Counsel for plaintiff objected to the witness detailing a conversation he had with Mr. Bagnall, upon the ground that the same is incompetent, irrelevant and hearsay.

(Mr. McGOWAN continuing:)

That the complaint had been lodged against me by the Columbia River Packers' Association alleging that I was obstructing [235] navigable waters of the Columbia River which were under the jurisdiction of the United States and he was going down to Sand Island in that interest and asked me if I wanted to go. I said yes, I would like to go. Then we got aboard the steamer "Arigo" and proceeded down towards Sand Island and were passing down the channel of the river just south of Sand Island, and when we got a short distance beyond the eastern end of the island we ran across a lot of gill nets which had the river practically blocked all across the channel. He wormed his way around amongst these gill nets a mile or so and came down to the vicinity of where these obstructions were alleged to be, as he said, and looked out across the west and could not see them; he then asked me where they were. I told him where they were and he pulled in close to the shore, as close to Scarboro as he could, and got out his field-glasses and made out some of the buoys along the shore there with



(Testimony of H. S. McGowan.)

his field-glasses. By that time the gill nets had gathered in thicker and closer around him, so he turned his boat about and went back and landed me at our dock and went away.

As a matter of fact, we were not in line of navigation with these buoys. After that I never heard anything further from the War Department. Shortly after that these buoys disappeared. A part or all of them disappeared one day or night, I don't remember which, and I immediately had others prepared and had them replaced. The next thing was that I learned that the Columbia River Packers' Association had forcibly removed my buoys and locations, and I immediately consulted my attorney, Mr. Welsh, for the purpose of getting out an injunction or restraining order to restrain them from interfering with my property and just before the papers were finished, I think it was, the deputy United States marshal appeared on the scene and served some papers on me. These turned out to be the papers in this suit. At the time the papers [236] were served I was actively engaged in preparing papers for my suit against them. Each of these markers cost from five to ten dollars. We placed on the ground sixteen in all; some were removed and some replaced again. I think there were placed on the ground something over twenty of these markers or buoys. The practical fishing season opens at that place usually about the first of July and continues on and until the close of the season, August 25th, I was prepared to fish these grounds, that is my set net



(Testimony of H. S. McGowan.)

locations. We had part of the gear necessary and were preparing the other. I had some gill nets on hand and we were actively engaged in buying some others at that time, and we had expended, I should estimate, several hundred dollars for an outfit that we had secured at that time. All of our set net locations were below and beyond low tide, probably 50 to a 100 feet below the line of low-water mark, extending out into the stream and none were above the line of low tide. We also had a drag seine license for that location that year. It was issued April 1, 1908, and this license was posted on the premises on a board with black letters or figures on a white or light ground, nailed upon a post at each end of the location. The number of that license was 726, issued by the Fish Commissioner of the State of Washington. I had this license at the same place I had posted our former seining licenses on the same premises. There was a post driven in the ground standing up probably five or six feet above the surface. The license numbers were painted on a board or boards in black letters about ten inches long, on a white or light colored ground, and these boards containing the license numbers were then nailed upon this stake in a conspicuous manner. This license number, 726, was placed there immediately after the license was received. It was not issued until the first of April and probably was not received from the Fish [237] Commissioner for a day or two afterward. It was posted, however, during the month of April, 1908. I took a photograph of that monument which marked my drag

(Testimony of H. S. McGowan.)

seine license. I cannot give the exact date it was taken, but it was subsequent to April 1, 1908. I took the picture myself. There are a number of boards nailed to the same post other than the one that carries the number of this 1908 license. These are the licenses of the previous years. The license number did not show very plainly. The weather had beaten the lettering off so that it was indistinct unless you get close up, but the number 726 appears prominently.

Mr. DORR.—The license that the witness is testifying about, which is 726, bears the date of April 1, 1908, and is purported to be a license for one year, ending as it is printed in this blank, March 31, 1908. This would be the day before the date that it was issued, which counsel contends at this time is manifestly an error of the expiration date by the issuing office. We may have to ask some indulgence to prove that if any objection is made against it.

Mr. FULTON.—I will stipulate that this was a mistake in the date; that the date should end on March 31, 1909.

(Witness continuing:)

This license was renewed with the same number for 1910 and again renewed for 1910-11, which is the present license. J. D. McGowan is a brother of mine.

Whereupon counsel for defendants offered the three licenses referred to by the above witness as Defendants' Exhibit No. 11. To the introduction of said licenses in evidence and each thereof, the plaintiff by its attorney then and there objected upon the ground the same are, and each was, incompetent, irrelevant and immaterial. [238]

(Testimony of H. S. McGowan.)

Whereupon said three licenses were received in evidence and marked Defendants' Exhibit No. 11, and the same are hereunto attached so marked.

(Witness continuing:)

The monument located on the ground as shown in the photograph that I have just testified about, shows my license to be No. 726, is located at the eastern end of the location line and it does not cover all the grounds that are in controversy in this case, but it covers a considerable part of it, that is about 3,000 feet, but the plaintiff occupied all of the ground covered by our license numbers. The license covers nearly all of the ground between the end limits of Site No. 2, Site No. 2 lacking about 400 feet.

Thereupon counsel for defendants offered said photograph in evidence. To the introduction of which the plaintiff by its attorney objected on the ground the same is immaterial.

Whereupon said document was received in evidence and marked Defendants' Exhibit No. 12, and the same is hereunto attached so marked.

(Witness continuing:)

This monument shown in Exhibit No. 12 is just about clear of ordinary high tide, and is quite a little ways back of ordinary low tide. I could not say how many feet back from the line of high tide, but it varies a few feet. These tides vary a few feet and at other times hundreds of feet, but at ordinary high tide I should say this post was from 50 to a 100 feet back therefrom.

It ought to be stated that this ground is very



(Testimony of H. S. McGowan.)

materially changed since pound nets were there. At the time pound nets were located there on what is known as the south end of Oklahoma channel, and since that time they have become sanded up by [239] movements of portions of the Republic spit which moved in there on numerous occasions, so that points where the pound nets were originally located are all throroughly sanded up and does not come to the shore line any more at all. I might say that one pound net was on the shore line and was removed in order to get it away from the seines. I operated a pound net there from about 1892 or '93, to about 1896 or 1897. From 1901 to 1908 no one ever disputed my right to operate seines on the Brumbach seining ground. I have renewed my set net licenses that I obtained in 1908 every year since and I have these renewals with me. They are numbered 1431, 1432 for 1908 and ending March, 1909. The renewal number of 1431 was number 430 dated April 1, 1909, ending March 31, 1910.

These renewal licenses were all, after being identified, offered in evidence, being No. 1431, April 5, 1908, renewal No. 430, April 1, 1909, and renewal No. 668, April 1, 1910. To the introduction of which plaintiff by its attorney objected on the ground that the same were, and each was, immaterial and irrelevant, and particularly as to No. 430 and No. 668 for the same reason.

Whereupon said licenses were received in evidence and marked Defendants' Exhibit No. 13, and the same are hereunto attached so marked.



(Testimony of H. S. McGowan.)

Counsel for defendants then offered in evidence the licenses issued by the Fish Commissioner which had been identified by the witness, being No. 1432, dated April 15, 1908, and renewal number 431, dated April 1, 1909, and renewal number 669, dated April 1, 1910, all set net licenses. To the introduction of which plaintiff by its attorney then and there objected upon the ground that the same is immaterial, irrelevant and incompetent.

Whereupon said licenses were duly received in evidence and marked Defendants' Exhibit No. 14, and the same are hereunto attached so marked. [240]

Thereupon counsel for defendants offered in evidence the licenses identified by the said witness, numbers 142, 143, 144 and 145, issued to him by the Master Fish Warden of the State of Oregon under date of June 19, 1909. To the introduction of each of said licenses counsel for plaintiff then and there objected upon the ground that the same are immaterial, irrelevant and incompetent.

Whereupon said licenses were duly received in evidence marked Defendants' Exhibit 15, and the same are hereunto attached so marked.

**Stipulation [as to Certain Licenses Issued by Fish Commissioner].**

It was then admitted by the plaintiff that the Fish Commissioner of the State of Washington issued to the defendant J. P. Coyle set net licenses numbered 1436, 1437 and 1438, under date of April 15, 1908; that the said Fish Commissioner also issued licenses purporting to be renewals of the last three men-

(Testimony of H. S. McGowan.)

tioned licenses under date of April 1, 1909, bearing numbers respectively 435, 711 and 712, and licenses also purporting to be renewals were likewise issued by the same official under date of April 1, 1910, numbered 660, 661 and 662, and the same admission is made to similar licenses issued to defendant Erick Lindstrom, which consist of the original licenses numbered 1433, 1434 and 1435, each bearing date of April 15, 1908, and with the purported renewals thereof numbered respectively 432, 433 and 434, dated April 1, 1909, and the subsequent purported renewals of the last-mentioned licenses bearing date of April 1, 1910, and numbered respectively 658, 659 and 692, licenses being identical in form and covering the same district, the Columbia River district, as the licenses to H. S. McGowan, already introduced. But plaintiff, through its attorney, objected to the introduction of said licenses in evidence upon the ground the same were, and each was, immaterial, irrelevant and not within the issues. [241]

Q. Now, Mr. McGowan, what was the reasonable quantity of fish, salmon, that could be caught in this fishery which you and the other defendants were enjoined from operating in 1908 by reason of the injunction which issued out of this suit?

To this question the plaintiff by its attorney then and there objected upon the ground that it was incompetent, irrelevant and immaterial. And upon the further ground that a court of equity has no authority to assess damages in this suit, and the plaintiff has a constitutional right to a jury trial on

(Testimony of H. S. McGowan.)

matters of damages, if any were suffered, and further, that the witness is incompetent to testify on that question.

A. It would be a very large quantity. I would estimate that from 150 to 200 tons of fish. The average value per ton in 1908 would be about \$110 per ton. This could not be very well valued between the three of us defendants on a pro rata basis of the number of nets, for the reason that the lower locations were more valuable than the eastern locations. The locations of mine were adjacent to and easterly from what is known as the "Great Republic" wreck, and that is the best piece of fishery ground in that part of the Columbia River.

Q. What, in your opinion, would have been the reasonable amount of fish, salmon fish, for you to have caught on that ground each year, 1908, 1909 and 1910, during which you have been restrained?

To this question counsel for defendants objected upon the ground that it is immaterial, irrelevant and incompetent, and that the Court had no jurisdiction to assess damages against plaintiff in equity; that the plaintiff was entitled to a jury [242] trial, and that the witness was incompetent.

A. It ought to be easily 50 tons or more per year on my grounds, and I would say that the other territory being more extensive in length might produce about the same amount of fish, about 50 or more tons per year. According to the best of my judgment a reasonable estimate would be 50 tons for each of the three defendants per year. I am talking



(Testimony of H. S. McGowan.)

mostly about Chinook salmon, a certain portion would be what is termed steelheads. They are a fish that are used commercially for canning, mild curing and freezing. The price I have mentioned above would be about the average price for 1908. The average price for 1909 would be about \$120 per ton, and the average price for such fish during the year 1910 would be about \$130 per ton.

I am familiar with the territory between the mainland on the right bank of the Columbia River and Sand Island. Extending from the north shore of the river west from Fort Columbia along what is termed Chinook beach down past the town of Chinook and for a considerable distance below Chinook, probably a distance of perhaps three miles, and extending diagonally down the stream off the shore over to Sand Island it is a big shoal or tide flats. At mean low tide and fair weather conditions when there is no disturbance in the wind or storms, there is not any navigable water out in that country. There are some pot holes and small sinks, or something of that sort, here and there, and bunches of high sands dotted along, but it is dry and not navigable, partly covered sand and partly mud flats. It is not navigable up and down the river at low tide, not even with a canoe. Nothing that a man could ride in would navigate there. I have never walked continuously out there because it is pretty muddy in places, but I have been over all of the flats from time to time clear [243] out to Sand Island. I have been out there on foot but I have not walked



(Testimony of H. S. McGowan.)

it in continuity from the shore to Sand Island, but have been over different parts of it on foot. The conditions that prevailed in June, 1908, and since that time, generally speaking, there has been a gradual upbuilding of all these flats, I have no means of knowing how rapidly that accretion is forming, only I know it gets gradually more pronounced in most places, getting higher each year in most places. In some spots I have noticed it does not change but a little, in others it changes more. There are fishing traps still in operation in Bakers Bay. Down in the Ilwaco end of the bay there are a number of fish traps still operated and in the territory inside, that is towards the Washington shore and upstream from the eastern end of Sand Island there are a great many fish traps, but there is quite a large section in between these points and located between what might be called the central part of Sand Island and Chinook beach out towards the mouth of Chinook River, where practically all of the original traps were, have been abandoned owing to the shoaling up of the water and the absence of any more fish on these flats. The territory that I have just described as being mud flats or sand flats, nearly all get dry at low tide. There are other traps, however, easterly of Sand Island and just shoreward from the eastern end of the island for a short distance where they do not get dry. I have one or two photographs that I took down there where I could find the greatest amount of water at the particular time I took the pictures. I have a couple I think

(Testimony of H. S. McGowan.)

I took in June, 1908. (Here witness produced two pictures.)

When I took these pictures I was standing on the flats about 1,000 feet to the east and north of the inner side of Sand Island between what is called the Island and the Chinook beach shore. The view of them extended towards the Washington shore. [244] This view covers places where there was the most indication of water between Sand Island and the Washington shore. These pictures were taken approximately an hour after the tide indicated as low tide on the tide table. The tide was rising at the time. These pictures were taken, according to the best of my recollection, in June, 1908. I would not be positive as to the exact date, but approximately at that time. I think they were taken between nine o'clock in the morning and half past nine; maybe as late as ten. They were taken at the same time.

Counsel for defendants then offered said photographs just testified to, by said witness, in evidence. To the introduction of the same in evidence counsel for plaintiff then and there objected upon the ground the same are immaterial and irrelevant.

Whereupon said two photographs were received in evidence, marked Defendants' Exhibits 16 and 17 respectively, and are hereunto attached so marked.

(Witness continuing:)

In one of these pictures you will notice a man and a boy, one is my brother and the other is my son.

On the higher part of these tide flats between Sand

(Testimony of H. S. McGowan.)

Island and the Washington shore, generally speaking, there is no vegetation; on the lower part of the flats are the most indications of water, there is water grass growing.

Q. What did you pay for whatever right you acquired from Brumbach?

To this question counsel for plaintiff objected upon the ground that it was immaterial and irrelevant.

A. \$2,000, if I remember correctly. The greater part of it was [245] for fishery rights principally; part of it was for a few old horses Brumbach had, and a couple of sailing skiffs, and two old seines.

I built the wharf that I spoke of some time ago; at a point about what might be termed the center of the inner side of Sand Island proper and running down across the tide flats to a sort of hole or part of a sink located there, conveniently where the boats could come in and make a landing when the tide came up. The outer end of the piling was below the line of low tide, in a hole or sink which was then below low tide. There might have been a foot of water there at low tide, and so far as I know that wharf is there yet, and so far as I know the plaintiff may have used it. The plaintiff has been using the building which I built there so far as I know ever since the summer of 1908, that is, since about July, 1908.

I bought other fishing rights down there other than I purchased from Brumbach. I do not remember the year, but I think it was along about 1904. I pur-



(Testimony of H. S. McGowan.)

chased from Reischman Brothers along about 1904, and I also purchased some alleged rights from a man named Graham, I think in 1905. These fishery rights were westerly from the "Great Republic" wreck adjoining what is known as the Brumbach ground on their eastern end and extending in a westerly direction down the shore. These fishery rights would not be in front of the sites in controversy. Those grounds or fishery rights were located mostly, if not all, in front of Site Number One. They may have overlapped Site Number Two on the west end a few hundred feet possibly, perhaps not. I paid \$3,000 if I remember correctly, for these rights and I took a bill of sale therefor, but I do not have it with me. I do not know whether the plaintiff knew of that purchase, excepting the Graham purchase I mentioned. The Graham purchase of alleged fishery rights was back on the westerly portion of the Reischman premises. I do not know if the plaintiff knew about the Graham [246] purchase, but R. A. Hawkins, who was a witness in this case on behalf of the plaintiff, was a witness to the bill of sale, and he knew it. I have also bought some fish traps down in the same territory, which were located in the channel that I have spoken of as the Oklahoma channel. These are all sanded up, the most of them, I think. I have a photograph or two here showing some of those traps that sand into the island. At the place shown on these photographs which are now apparently covered with driftwood and debris of one sort or another, this was under water at that time



(Testimony of H. S. McGowan.)

from the point where the piling are to the fore background of the picture. That is all portions, the Peacock spit and the Republic spit that have washed in there between 1890 and 1900. These pictures were taken along in the summer of 1908, I think, and were taken by myself. These properties shown in these photographs were fished in the Oklahoma channel as late as 1898 probably. In the immediate foreground I should think that the sand has been blown up by the wind and washed up by the waves, probably from three to six or eight feet above ordinary high tide, and in the background beyond where the piling appears the sand has been washed and drifted by the winds equally high, probably six or eight feet above mean high tide. In 1898 the channel there had gotten quite shoal excepting in pot holes, which were portions of the old Oklahoma channel, that might have been six or eight feet deep at low tide. When these traps were put in there the deepest water in the channel would run about seven to eleven feet. Within a period of approximately ten years, ten to twelve years, it has shoaled up from about eleven feet to practically nothing, that is as a continuous channel. There are holes in it, but the mouth was completely shoaled up by that time. That is to say, where the surface is five or six feet above high tide in 1898, it was some five or six feet below low tide. That would [247] make a range of approximately fifteen feet. This is a fair illustration of the shoaling up of that portion of the territory, that is, ranging over hundreds of acres, probably running a mile

(Testimony of H. S. McGowan.)

and a half in length, and in places, I guess, a mile and a half in width. The shoaling has not been uniform throughout the entire district by any means. I should estimate roughly, that from 25 to 50 traps have been put out of business by this shoaling process. I know about Sand Island having moved. A good while back, along about 1876, '77 or '78, along in there somewhere, the island was very much to the south or southeast of where it has now grown to be. From that time up to the present the main body of the island had grown in the north a very long way, possibly a mile and a half or two miles. It also became very much elongated to the east, connecting with the Chinook flats for a distance of maybe a mile, or a mile and a half. And I knew where the north ship channel was. Sand Island as it is now located is north of what was the north channel. It has moved right across that channel on the north side of Sand Island. One part of the main bulk of the island ceased moving north along about 1888, I should say, but continued to grow in a northerly direction, adding on and enlarging in the direction of the north and slightly to the east, and some to the west, and later on it had grown considerably to the westward, if portions of Peacock and Republic spits might be termed parts of the island now. And I think the northern end has ceased growing practically and there is a general filling up of the flats between the so-called island and shore. It is navigable over these flats when the tide is up, or high tide. The kind of navigation may be stated to be that fisherman ran

(Testimony of H. S. McGowan.)

their fishboats, flat-boats, gill net boats, and when the tide is up the fish launches run from various places into Chinook and into fish scows that are located around in the neighborhood of Chinook for [248] fish stations, and also to Ilwaco where our cannery is located. There is no regular navigation that passes up and down the river on the north side of the island. There is no navigation there with the exception of one launch that plies on the tide between Ilwaco, Chinook and Astoria. The sort of boats that plies in these waters are all small fish-boats belonging to fishermen or small launches. In the case of this boat which I said plies from Ilwaco to Chinook and Astoria, it is a launch about 50 feet long. I would say there are one or two tow-boats that are operated in towing rafts across out of there at high tide from the Wallicut River, occasionally, not often, and once in awhile from the Chinook River. The ordinary flat-boat used by trappers draws possibly six or eight inches when they are light. Sailing and gill net boats will draw a foot to a foot and a half, and some two feet of water. They are center board boats. The motor fish-boats used by some fishermen there will draw about two feet of water. These fish carrying launches that ply between there when the tide is up, generally draw about four feet of water. Some of them three and some four. These tow-boats do not ply with any regularity on any route but tow logs occasionally from the Wallicut and Chinook rivers to the mills. The Wallicut River has its mouth about a mile and a half in a generally north-



(Testimony of H. S. McGowan.)

easterly direction from the town of Ilwaco, and the mouth of the Chinook River is about two miles further east than the mouth of the Wallicut. They are really tidal sloughs, not rivers. The loggers haul their logs down into the beds of these streams and at high tide they take them out to a boom for a raft. These logs can be towed only at high tide.

Thereupon counsel for defendants offered in evidence the two last photographs identified by the witness. Counsel for the plaintiff objected to the same upon the ground that each was [249] immaterial, irrelevant and incompetent.

Whereupon said photographs were received in evidence, marked Defendants' Exhibits 18 and 19 respectively, and are hereunto attached so marked.

(Witness continuing:)

There is no navigation that I know of at all passing up and down the river around Sand Island or out through the main mouth of the river from above Sand Island to the mouth of the river below Sand Island, and I would be able to know it if there was. The only boat I know of that goes out through there into the main Columbia from between Fort Canby or Disappointment and Sand Island is the life saving boat which goes out there from Fort Canby life saving station. Of course some fishermen will occasionally get out from there through the breakers, but there is no navigation through there.

I was present at the examination of the two witnesses who testified for plaintiff in this case before the referee on the 15th day of September, 1910, and



(Testimony of H. S. McGowan.)

heard their testimony, I heard what these witnesses said with respect to the ground which myself and co-defendants located with set net licenses, and I heard them make some remark about these grounds being unfit for set net fishing. They are mistaken about it, that is all. They are suitable for set net fishing and I intended in good faith to use them for that purpose, and I would have done so had I not been enjoined in this suit, and I was making all preparations for that purpose and I am able to state that it was a practical way of catching fish at that place with these set nets.

Q. Something was said by the two witnesses to whom you referred as testifying for the plaintiff, that the only evidence of any fishing gear you had out there was a piece of net that was drifting up and down with the current. What are the facts about the installation of your fishing gear, what were you intending to do and planning to do? [250]

A. I had no gear drifting up and down there that I know of. It was intended to be fastened and to fish these locations at favorable portions of the tide, but not to be kept there at all tides, but at tides as were most favorable to fish there. The nets that were being used at that time were two. They were old nets and we were preparing new nets to take their places and to use on other locations.

We employed Walter Bussey and Iver Stensland to take charge of these locations. There was no part of these locations above the line of low tide.

Had I been permitted to fish the locations my en-

(Testimony of H. S. McGowan.)

tire gear and operations would have been located and worked below the line of low tide.

The only reason I ceased to operate there was because I was enjoined by the Court in this action. I had no other reason. Since I have been enjoined, I have done nothing there.

Witness temporarily excused.

**[Testimony of G. B. Hegardt, for Defendants  
(Recalled).]**

G. B. HEGARDT a witness on behalf of the plaintiff being recalled, testified in response to interrogatories propounded to him by counsel for the defendants, as follows:

(Interrogated by Mr. DORR.)

Q. Do you know, while you were employed by the engineering corps of the War Department, what the attitude of the Department was on the south side of Sand Island with respect to a fairway line or limiting line beyond which stationary fishing gear was not permitted to be constructed or anchored?

Mr. FULTON.—That is objected to as immaterial.

A. Yes, sir. When that line was laid out as a limiting line beyond which no stationary gear could be erected, there was no objection to putting anything inside of the line and conducting [251] any operations in fishing.

(Witness continuing:)

The Government or War Department did not require specific permits. They were simply allowed to do as they pleased inside of that line, excepting that the State would grant licenses. I know where this

(Testimony of G. B. Hegardt.)

line was and it was outside of Sand Island, and from the testimony given in this case I would say that the lines were outside of Sand Island. I mean by that such lines did not extend out into the Columbia River any further than Sand Island, and the limiting line was further out in the river than these locations.

Cross-examination of G. B. HEGARDT.

(Interrogated by Mr. FULTON.)

The Government permitted stationary fishing gear south of Sand Island and was never changed to my knowledge. If there was any change in this line I never heard of it. I left there in 1905. I know, of course, that the Government in 1905 or 1906 took charge of Sand Island and excluded everybody from it excepting those to whom it granted licenses. At least, I think that was the object. Prior to 1905, the Government did not care who went there on the island. But in 1905 or 1906 the Government took charge under regulations of the War Department and used it for revenue and leased it out to different parties for seining purposes.

**[Testimony of H. S. McGowan, for Defendants.]**

(Here Mr. McGOWAN, one of the defendants, interrupted the witness and made the following statement as part of his original testimony.)

I now recall previous to 1905, in 1903 or 1904, the War Department did insist upon people who were using drag seines on the Island getting formal permission to drag their seines between the high and low water near the shore of the island. I think that



(Testimony of H. S. McGowan.)

came out first about 1903 and later on in 1905 it was changed into this formal lease system; that is shown in some of the plaintiff's [252] exhibits at the former hearing. These previous permits or permissions were issued merely in the form of a letter of permission with no consideration attached.

This had nothing to do, however, with this limiting line, and had reference only to the use of Sand Island working on the beach, and it had nothing to do with navigation. This had nothing whatever to do with the fishing rights, but was simply a question of regulating the use of Sand Island itself, that the Government claimed to own. That is as I understood it.

**[Testimony of G. B. Hegardt, for Defendants  
(Recalled).]**

Witness G. B. HEGARDT continuing:

Now the object of the permits suggested by Mr. McGowan was preventing conflicts that were often going on on the island between the different parties seining there, but the Government never attempted to issue licenses for fishing, and never exercised any control over the fishing itself or the fisheries there. That was a matter purely for the States and was so recognized by the War Department.

Cross-examination.

(Interrogated by Mr. FULTON.)

During the time I was there, no fish traps were ever constructed or operated in the vicinity of Sites 1, 2 and 3, on Sand Island. The bank was very abrupt there and impossible to use traps there. This



(Testimony of G. B. Hegardt.)

ground was used exclusively for seining purposes, excepting on the south and west end. There were traps in front of Site No. 1, south and westerly. That was a great many years ago; I don't remember. I think there was also a trap in front of Site No. 2, and I think they came inside of this line. I do not know who had them. There were none in front of Site No. 3.

Redirect Examination.

(Interrogated by Mr. DORR.)

There was no objection on the part of the Government to [253] locating traps anywhere along on the south side of Sand Island within the limiting line, and this limiting line on the south side of Sand Island is shown on this map that I now have in my hand.

Whereupon, counsel for defendants offered said map in evidence, and the same was received in evidence, marked "Defendants' Exhibit No. 20," and the same is hereunto attached, made a part hereof and so marked.

The line that I have referred to as the limiting line is marked on this plat in red ink, as follows: "U. S. Engineer Department, Limiting line, south side Sand Island." I prepared this map. It is a copy of one sent in to the Department from Fort Stevens; it is a copy of an official map, and this line correctly shows the limiting line that was used by the War Department, and that is taken from the official record of the lines established early in 1890. The scale of this map is one ten thousandths. The

(Testimony of G. B. Hegardt.)

shortest distance between the limiting line shown on this map and the line of low water on the south side of Sand Island is 800 feet. The average is over one thousand feet.

**Q.** Is there any place in front of Site Number Three where the distance is as short as the shortest distance in front of Site Number Two?

**A.** I may say that that distance referred to as 800 feet is opposite Site Number Two. The shortest distance between the limiting line and the low-water shore line is on the south side of the island in front of Site Number Three, and is one thousand feet, and anywhere within that limiting line the Department made no objection to any kind of gear, fixed, stationary or anything else for fishing purposes. I refer prior to 1905; after 1905, I do not know. [254]

**[Testimony of H. S. McGowan, for Defendants.]**  
**(Recalled).]**

H. S. McGOWAN one of the defendants, was recalled by defendants, and testified as follows:  
(Interrogated by Mr. DORR.)

Counsel for defendants handed witness a map (Defendants' Exhibit No. 20) and requested him to indicate approximately the set net locations owned by the defendants.

The locations made by myself and the other defendants were as follows:

There were four locations in front of Site No. 2 and four locations in front of Site No. 3. There were none further south than this limiting line, and the

(Testimony of H. S. McGowan.)

eight locations were between the limiting line and the line of low tide.

In reply to your question awhile ago as to whether I had anything further to say, there have been remarks relative to desirable locations out there with reference to Site No. 2. I would say that while we were carrying on our seining operations on Site No. 2, which we designated as the Brumbach fishery, we from time to time removed piling from two fish traps that were located in front of what we termed Site No. 1, because those piling and fish traps interfered with our seining operations. One of the traps was located at that point probably 1200 feet easterly from the "Great Republic" wreck and probably 400 or 500 [255] feet westerly from the eastern limit of Site No. 2. The other trap was located at a point 1000 or 1500 feet further to the west but still in front of Site No. 2 and on the beach adjacent.

I fully completed all of our locations. I did not fish there because I was enjoined. I had two old set nets operating there a few days before we were enjoined. I got the permanent location but did not get into permanent fishing operations at all. I had not yet surveyed the locations out. In my judgment the reasonable cost of operating the fishery owned by the defendants in front of these sites would be in the neighborhood of about \$30 a day. The active operative season begins there about the first of July and lasts until August 25th, about fifty-five days. It would require some extra time in making preparation, however, to get to work. For that kind of



(Testimony of H. S. McGowan.)

work it would probably—could be done inside of a week, at the most, two weeks. And at the outside I could figure \$30 a day for seventy days. This does not include gear, material, boats or paraphernalia, but includes the cost of operating, not the wear and tear of gear or material; that would be more. It would require a set of nets, eight of them, as well as extra nets. It might be necessary to have a complete change of nets, that is, to have sixteen nets instead of eight. It might not be absolutely necessary, but it would be very desirable in case some might be damaged to have the other nets to replace them. Besides nets cannot be kept in the water continuously without rapid deterioration. In regard to the total outside cost of everything, I would say that the labor cost would amount to \$30 a day, which would be in the neighborhood of \$2,000 or \$2,100 for the season. It would require in the neighborhood of \$500 worth of webbing that would be used up in the wear and tear probably. It would require lines and rope and other gear to the extent of possibly \$150, outside of the nets themselves, [256] and it would entail deterioration in the value of the boats used, which might be \$100, and it might be essential to employ a special watchman to assist in looking after the nets, which would probably cost \$150 additional. I have estimated the cost of anchors with the cost of other gear independent of the nets. The total would run up in the neighborhood of \$3,000 for the season. It is practicable to operate that fishery without landing on Sand Island at all. The use of



(Testimony of H. S. McGowan.)

Sand Island there is of special value without the use of the adjacent fishery.

The price that I have mentioned, namely, \$3,000 per year, applies to all and each of these three past years, and includes the operation of all the eight set net locations involved in this suit, including the two held by myself and those held by the two defendants. I have treated them all as one fishery. It would be the most economical to operate them together and we had made an arrangement to operate them together.

I was intending to apply these four Oregon licenses on this same territory. The Oregon licenses were not used because of the general understanding that the territory was within Washington. That was common knowledge of everybody, or supposed to be.

The Oregon licenses were procured for this particular location. There was an uncertainty in my mind as to the technical legal status on account of the litigation going on as to the boundary and matters connected with it, and that was a measure of safety. I did that so as to cover it either way in both States, that is to cover the ground.

Cross-examination.

(Interrogated by Mr. G. C. FULTON.)

I purchased these four Oregon licenses as a precaution and I think I purchased them before the decision of the Supreme [257] Court was handed down. After that I obtained the Washington

(Testimony of H. S. McGowan.)

licenses for the same places for these same set net locations for each of the years 1909 and 1910. I did not understand at the time I made these purchases of Washington licenses that the Supreme Court of the United States had held Sand Island was in Oregon. I believed that in the final wind up Sand Island would be in the State of Washington. I believed there would be an arrangement between Washington and Oregon that would fix the boundary south of Sand Island, as a matter of comity between the two States, if for no other reason. I did not think Oregon had anything to give up. My belief was taking all the decision together, that the decision itself could not be made consistent, and I believed that the effect of the opinion must be that Sand Island would be in the State of Washington. That was my construction of the opinion, because it could not be made consistent otherwise. The opinion is absolutely contradictory in its terms, and I construed Sand Island as it stands there to-day is in the State of Washington. And that is my understanding of the opinion of the Supreme Court. But that was not the reason why I obtained no further licenses from the State of Oregon. The reason was simply that I had been enjoined by the Court from proceeding any further, and I did not proceed any further, and that was the only reason. I understood that by obtaining licenses from the State of Oregon to operate these set net grounds I would be violating the injunction, that is, I did not know but what I would. It is true that I obtained from the Fish Com-

(Testimony of H. S. McGowan.)

missioner of the State of Washington set net licenses for the same grounds for the succeeding two years, but the conditions are altogether different. It is true the suit was brought in the State of Washington, but, as I say, conditions were different. The different conditions are that the Washington statute provides for renewal licenses and the Oregon statute, so [258] far as I know, does not. I thought I had a right to renew these licenses regardless of the litigation.

(Here counsel for the plaintiff demanded that the witness produce the statutes of the State of Washington providing for the renewal of such licenses, but the same was not produced. Counsel for the plaintiff then handed to the witness the Session Laws of the State of Washington for 1905, and asked the witness to examine the same and point out the statute authorizing the renewal of Columbia River licenses.)

(Witness continuing:)

A. I do not find what you are discussing.

Q. Your attorney pointed it out. Now the fact is that that refers only to Puget Sound. I will leave the matter of the law of renewals to your attorneys and let them find out. This book I am referring to and handed to the witness by Mr. Dorr and marked under Section 2, Chapter 139, refers only to Puget Sound.

A. I know it has always been the practice down on the Columbia River. The Fish Commissioner has so issued the licenses.

Referring to the Brumbach purchase, I do not wish



(Testimony of H. S. McGowan.)

to be understood as saying we bought any frontage but the fishing rights not on the island but in front of the island. I did not buy any rights on the island. I understood that the Government of the United States claimed the island and were the only ones who were making active claim at the time, and my purchase was of the fishing rights in front of Sand Island and I claim nothing by that transfer of any shore rights. What I do claim under that purchase is that I am entitled to whatever they are good for which is not yet taken. I knew that Brumbach had no title to any shore land or anything beneath the water or on top of the water other than the license might have given him, and I understood [259] the same in regard to the Reischman ground and also the Graham ground. The wharf that I constructed was not on the south shore of the island, but on the inshore and nearly a mile from the ground. The nearest point, I suppose, would be something over half a mile across Sand Island. Both Brumbach, Reischman and Graham had employed the ground that I had purchased from them exclusively for seining purposes, although I am not sure about Graham; I don't know whether Graham ever really seined there. There were some old trap piling on the Graham premises; they were not being used at that time. After I acquired the bill of sale from Brumbach and Son I fished the ground included in his right, whatever that was. It extended from a point about 400 feet westerly of the east end of Site No. 2. I think I began fishing there in 1902, and I fished it



(Testimony of H. S. McGowan.)

in 1903, 4, 5, 6, and 7, I believe. The licenses were in the name, I think, of McGowan Brothers. I did not rent the ground in 1905 from the Government. I never did rent it from the Government; 1905, I think, was the first year the Government put the leases for what they termed Sand Island sites up for auction or rental, or to the highest bidder, and at that time what is termed Site No. 2 was bid in by Stensland, who was the highest bidder. He was a fisherman and was not in my employ. His son was, or one or two of them were in my employ afterwards. He got the bid on his own ground, that is, Site No. 2. The Stensland boys and Stensland himself had long years previously acquired an interest in what is known as the Reischman grounds, in fact their interest was approximately a half interest, and the interest we bought from Reischman being the other interest. They were joint users of that territory and we bought Reischman's rights, but we did not buy Stensland's rights, and that locality was largely on Site No. 1. Possibly a little overlapping on the west end of [260] Site No. 2. Stensland had bought all of Site No. 2 and I made an arrangement with Stensland after he bid in that, for about 1400 feet of that site easterly from the "Republic" wreck, that I wished to use the same that I had been using the Brumbach ground, and the Stensland boys were using the other adjoining on the east. There was some 3,500 feet space and I think about several hundred feet of the boundary of Site No. 2 is what is called the "old Republic" wreck. According to our

(Testimony of H. S. McGowan.)

arrangements I took from the wreck eastward including about 1,400 feet. I think we were using about half of it and Stenslands were using the other half. My half was in the middle and I was to pay them a certain amount in proportion of the cost of it. I think we paid in the neighborhood of \$1,100. Their rental, I think, might have been fifteen or \$1,600 per year. I subleased from Stensland at \$1,100 per year. I think that lease was reduced to writing.

(Here counsel for plaintiff demanded that the witness produce such lease to be used in evidence in this case.)

(Witness continuing:)

I don't remember whether it was reduced to writing, but I do not have it here.

During all the years that I fished these grounds from 1902 to 1907 inclusive, seines were used exclusively. I do not recollect the number of fish we caught in 1902. I suppose we got about 100 tons, or thereabouts; I do not now remember. I do not recall how many we caught in 1903. My general recollection is that the catch was increasing and had increased right along. The grounds were getting in better condition all the time. The average catch of fish there on Site No. 2 during all the years that I had it I think would run from probably—I am talking of the Brumbach ground, that particular place it would run 90 to 160 or 170 tons on what is understood as the Brumbach grounds. This is [261] not practically in Site No. 2. There was several hundred feet of

(Testimony of H. S. McGowan.)

Site No. 2 easterly of the Brumbach ground which was occupied by Stensland. We actively operated two seines. We had other extra seines. Stensland occupied two seines and at times one or two below the wreck of the "Republic." We employed in operating these two seines, I think, a crew of sixteen men, and a cook extra, making an entire crew of seventeen men. We had sometimes eight and seven and one season we had ten horses. We did not use any launches, of course we did sometimes, but as a rule we did not. Our daily expense of operating the entire crew would average in the neighborhood of \$70. We paid our men then by the day; we paid them \$2.50 a day. I do not know what we paid in 1907. I think we employed them one *of* two seasons at \$2.00 or \$2.50 a day, and four bits a ton on the tonnage that they caught. I think it was \$2.00 a day and four bits a ton. Each man got four bits for every ton of fish caught. The average rental of horses was from 30 to 45 or 50 cents a day. The usual price I think was about \$4.00 a day for a team and driver that went with them, together with their keep and the keep of the driver. We furnished board and lodging for all of our employees in addition to their pay.

I bid on this Site No. 2 at the time the Government advertised to receive bids in 1908. I did that to avoid litigation if I could. I do not remember if I bid for Site No. 3 or not, but I bid on Site No. 2 and was an unsuccessful bidder. The Columbia River Packers' Association bid more than I did. The bids, I think, were opened that year sometime prior to



(Testimony of H. S. McGowan.)

May first, 1908, and at the time the bids were opened I knew that the Columbia River Packers' Association was the successful bidder for these two sites and I knew that they bid in these two sites to get my fishery away from me, and I knew that they intended to employ it in hauling seines. Of course I was disappointed to find out that there was an entanglement as to claims and interests down there when I [262] discovered that the Columbia River Packers' Association had outbid me. I did not conceive the idea of corking them. I conceived the idea of desiring to protect my property rights and my idea was simply to protect my property rights, and it was with this idea in view that I obtained the set-net licenses and put in set nets, that is to carry on my fishery there. Had I been a successful bidder for the site I probably would have employed the ground the same as I had previously employed it, that is in seining and I would have done so, I guess.

There were a number of bidders for these seining sites but I do not remember who they were. My understanding was that the lands that were bid in by the successful bidder would be employed for seining purposes. I do not remember the amount of my bid, but it might have been in the neighborhood of a \$1,000. I do not know whether Stensland Brothers bid for either of these sites or not, and it is possible that I may have signed their bond for their bid. I know they were interested and they had in mind bidding and may have made a bid, but I am not entirely clear as to that. I thought I was dealing fairly with



(Testimony of H. S. McGowan.)

the Stensland Brothers in attempting to overbid them when the property was offered for lease, for I intended to be perfectly square with them. I never would have bid in their ground and then taken it away from them. I understood that they had an equity down there, that is my feeling of equity. They had put in work and money down there and had fished in that country and there is a general feeling here among fishermen who are not trying to beat each other, that one man's rights ought to be recognized by another, whether they are legally enforceable or not.

(G. C. FULTON, Counsel for Plaintiff.)

Q. The public records showed at that time (1905) to the Columbia River Packers' Association and to the world, that Stensland Brothers had leased Site No. 2 from the Government?

A. That was in 1905. [263]

Q. In 1907, that is they leased it in 1905 but for three years, and the public record showed that, so that when it was offered for bid again we find you a bidder for it and the Columbia River Packers' Association a bidder for it and the Stensland Brothers?

A. And there might have been others too.

Q. Quite a number of people bid for it. Now if anyone had a right to put out a set net in front of this property, it would not be worth ten cents for seining grounds, would it?

A. I don't think it would.

Q. If Stensland Brothers had been successful in their bid and said to you, "We will charge you a little

(Testimony of H. S. McGowan.)

more than you can afford to pay this year," then you would have a right, according to your theory, to put a lot of set nets out in front of it and absolutely destroy whatever right the Government leased to them.

A. I would not destroy any of their rights because they did not get any. According to my contention I would still have a right to go in front.

Q. Why didn't you put out set nets in front of Site No. 3 in 1905 to 1908?

A. Because I didn't, that was all.

Q. Do you know any reason why you did not?

A. No particular reason, excepting that I didn't want to.

Q. You don't claim that the Columbia River Packers' Association in its leasing from the Government Site No. 3 trespassed upon any of your supposed rights?

A. They did certainly, when they began to operate there.

Q. As to Site No. 3?      A. Sure.

Q. I understand you claim you never acquired any of Site No. 3 and did not fish it in 1905, 1906 and 1907? [264]

A. No, I did not operate on Site No. 3 those three years.

Q. You had no interest in Site No. 3 in 1905, 1906 and 1907?      A. No.

Q. So that when the Columbia River Packers' Association was the successful bidder for Site Number Three, they did not trespass upon or acquire any fishery rights belonging to you or claimed to belong to

(Testimony of H. S. McGowan.)

you? A. That I had had previously, no.

Q. Then what excuse had you for putting those set nets in front of Site Number Three?

A. I did not have any excuse; I simply had a right; I was exercising my right.

Q. You stated awhile ago as I understood, that the reason you put these set nets in front of Site Number Two was to protect your fishery rights?

A. Yes, that is correct.

Q. Now what reason did you have, if not an excuse, for placing set nets in front of Site Number Three when you knew the Columbia River Packers' Association when it leased this ground from the Government intended to employ it as a seining ground; what reason had you for placing set nets in front of Site Number Three under those circumstances?

A. Because I had a right to and wanted to use it as a fishery; they did not lease any fishery. I did not do anything to the shore line; they leased the shore.

Q. That is your only reason?

A. That was the facts.

Q. That was your only reason?

A. Surely that was my only reason. I wanted to run a fishery there.

Q. You made a rather broad statement awhile ago that you did not consider that the Columbia River Packers' Association [265] was fair in making a bid that was more than you people bid for Site Number Two, because they did not protect your equity, or something substantially to that effect?

A. Well my meaning was that I believed their pur-

(Testimony of H. S. McGowan.)

pose was to go down there and take my fishing rights without consulting me whatever, and I think they did do that.

Q. And you thought that was wrong?

A. Yes, of course I did.

Q. But you still thought you were perfectly right and justified to go upon absolutely new ground in which you had no equity and by placing these alleged set net locations in front of it absolutely prohibit the Columbia River Packers' Association from employing that ground?

A. They simply made war on me and I protected myself the best I could by exercising my rights.

Q. Then you were not telling the truth awhile ago when you said that your only reason for putting set nets in front of Site Number Three was because you wanted to?

A. No, I said to exercise my right of fishery.

Q. You said that was the only reason and now you say the reason was that they declared war on you and you proposed to carry the war to them.

A. That was one branch of the case.

Q. And didn't I ask you if that was the only reason and you said it was? A. No, I think not.

Q. You think that is the statement? A. Yes.

Q. You made the mistake then?

A. Well, I did not put the question, and you put it that way.

Q. Now I understand that because the Columbia River Packers' [266] Association was the successful bidder for Site Number Two, on which you



(Testimony of H. S. McGowan.)

claimed you had a fishery right, you put these set nets in front of Site Number Three in order to carry the war into their territory?

A. That was merely one branch of the case.

Q. What was the nature of your fishery right on Site Number Two?

A. The nature of it was the purchase from the owner who had it before we had it.

Q. That was a seining right?

A. Fishery right; I could use it for any legal fishing I felt disposed.

Q. A fishery right, you say?

A. A right of fishery. At that time it was held under seining licenses.

Q. And thereupon the only right of fishery would be a seining right, because that would be the only one exercised; therefore it would be the only right he had?

A. That was the only right he had, in just those terms, yes.

Q. If he had any right at all it was a possessory right that was recognized by fair-minded people?

A. Oh, no, it was a legal fishery right he had.

Q. It was a seining right, that is all?

A. He could use it for other purposes.

Q. That is, he could?

A. Mr. Brumbach, yes.

Q. Nobody else could, could they?

A. Nobody could use it for any kind of fishery without his consent.

Q. That is the idea exactly; and thereupon the

(Testimony of H. S. McGowan.)

right, however that he had acquired, if any, was by virtue of employing it as seining grounds? [267]

A. Yes.

Q. And that was a right of fishery that he had, and incident to that he alone could employ it for set nets if he desired. A. Yes, sir, as I understand it.

Q. Stensland got that from the Government, didn't he, subsequently and you acquiesced?

A. No, they got their rights originally by locating.

Q. They subsequently, in 1905, acquired a lease from the Government and continued that same right precisely as Brumbach had continued it?

A. They got a right to use the shore. They did not get a fishery right from the Government.

Q. They did use the shore, continuing any right Brumbach had?

A. No, they did not continue rights on the Brumbach ground proper, excepting part of what is termed the Brumbach ground westerly of the "Great Republic."

Q. They got part of it and leased it to you?

A. They leased a portion of the use of the shore to me.

Q. And you are lawyer enough to know that whenever you accept a lease from a party, you are not in position to deny his title?

A. That is true; I did not deny his title to the use of the shore.

Q. It was his fishery right, wasn't it?

A. No, he had no fishery right on Brumbach ground.

Q. Still, out of the generosity of your heart, you

(Testimony of H. S. McGowan.)

paid him eleven hundred dollars a year for a right that he got for nothing?

A. I did that merely to avoid litigation.

Q. In order to buy your peace? [268]

A. Practically to buy peace.

Q. Nothing else; you paid him that for three years to buy your peace?

A. Practically so; that is about the size of it.

Q. Now since you are frank enough to admit that you put these set nets in there simply as a war measure I presume that you won't contend very seriously that they are of any very large value?

A. I certainly do; I don't say that they were merely and simply a war measure; that is just one branch of it.

Q. But you insist that they are of great value?

A. They are of great value, yes, sir.

(Witness continuing:)

A set net is a long or short dip according to local circumstances. It may be made out of cotton or linen; they are usually made out of linen. I do not know of any instance where a Columbia River gill net was made out of cotton. The size of the set nets and gill nets run from 5½ meshes up to 11. On the lower Columbia River, that is below Cathlamet, I don't know that they use a mesh smaller than six or seven inches; maybe as low as six and a half. The spring fish will run from seven to eleven inches in gill nets. In a general way a set net is constructed like a gill net. They have a line strung with corks known as floats and a lead line on the other side. If you hang

(Testimony of H. S. McGowan.)

a net too taut of course you won't gill your fish. If you hang it loose, it don't make any difference how swift the water is, it will hang loose. In the operation of set nets they are generally fastened at each end. Not necessarily, however, both the cork and lead line, but it must have some weight on each line. In front of Sand Island a good part of the flood tide and a good part of the ebb tide is dead water; dead water probably about half of the time. The current is so slack [269] that it is not difficult to hold against it and there is practically no current there for about half of the time, not enough to interfere with operations. You might operate a set net there all of the time but they would not fish successfully when the current was too strong, simply because as a matter of course when the current is too strong no nets will fish to the best advantage. A gill net will operate successfully in any water, clear, as well as muddy, in the daytime. In the operation of set nets we operate them practically half of the time, that is successfully. You can operate a set net successfully for about twelve hours a day, but a seine only about five hours in twenty-four. Sometimes they are run on a short tide and not be actually fishing more than three hours. Sometimes five or six or seven in twenty-four hours. The average time in which seines can be operated successfully is five to six hours per day. They are working a good deal longer but that is about the time the nets are actually working in the water, while set nets can be successfully worked there twelve hours in each twenty-four.



(Testimony of H. S. McGowan.)

(G. C. FULTON, Counsel for Plaintiff.)

Q. Don't you think you were very foolish and exercised very foolish judgment in operating seines on Site Number Two and the gentlemen who operated seines on Site Number Three exercised very poor business judgment, when he could have got more fish with set nets at one-third the cost?

A. It may have been; I don't know.

Q. During all these years of fishing on Sand Island at a very large expense of seining, they would have done better by using these measly little set nets?

A. I know they could have caught more fish and done a more profitable business by other means than drag seines.

Q. But I am talking about set nets compared with seines.

A. That may be true; it is a matter of opinion.

Q. Did you ever know of operating set nets in the vicinity of [270] where your set nets were proposed to be operated? A. No, I do not.

Q. How many practical fishermen resided in that vicinity and are familiar with Sand Island and its environments?

A. Well, I should think a good percentage of the population in that neighborhood are fishermen of one kind or another.

Q. All of them have had many years of practical experience in the fishing industry?

A. A good many have and some have not.

Q. And no set net has ever been established to your knowledge on the south side of Sand Island?

(Testimony of H. S. McGowan.)

A. I don't know as to that; I haven't become familiar with them there. They use seines and traps and gill nets.

Q. A trap will fish better in clear water than in muddy water? A. Yes.

Q. A seine will fish better in clear water?

A. Generally speaking it will; there are some exceptions.

Q. The reason of that is that the fish can see the lead of the trap and won't go against it but follow it up and get into the pot? A. Yes.

Q. And they can see the seine and will follow it along and ultimately get pocketed?

A. They may or they may fly the seine entirely.

Q. Whereas if it is muddy they will turn and get off? A. They are apt to.

Q. While with the gill net, if it is clear, they will lead right away from it?

A. It depends on the degree of clearness.

Q. Well, if they can see it?

A. It also depends on the local conditions, small breakers and so forth—a gill net may work well in clear water.

Q. The south part of Sand Island has been seined continuously, [271] that is the grounds included within the Sites Numbers Two, Three and Four, by seines for practically ten or fifteen years last past?

A. Yes, I should think they had.

Q. You have been interested yourself down there for pretty nearly twenty years?

A. That is with traps and seines. We did not do

(Testimony of H. S. McGowan.)

any seining until 1902.

Q. And you have made it a point to keep yourself familiar with the fishing industry on the Columbia River naturally? A. Fairly so.

Q. That is your life business, isn't it?

A. Yes, with the exception of when I am tangled up with a boom.

Q. That you say is a side issue? A. Oh, yes.

Q. And you have kept yourself familiar with the different seining outfits along the river, and where they are seining and about how much fish is caught, as nearly as fair business dealing will permit?

A. Well, I generally try to keep up with the current of affairs.

Q. You try to keep up with the procession?

A. Yes.

Q. And you have known naturally how long these grounds covered by these sites I have mentioned have been employed for seining purposes, have you not?

A. In a general way, yes.

Q. For about how long?

A. Site Number Two or the part called the old Brumbach ground has been used since about 1900 or 1901 for seining purposes, and Site Number Three I think perhaps was used a little longer than Site Number Two, but they have not always been used for seining, but partly for traps at one time. [272]

(Witness continuing:)

A good while ago there were one or two traps built in front of Site Number Three. It must have been as far back as 1896, or thereabouts. The principal

(Testimony of H. S. McGowan.)

reason they quit, I think, was because they were harassed a good deal by gill net fishermen and preferred to carry on seining rather than be harassed by gill net fishermen.

A. I mean that there was a lawless bunch of gill netters backed up by certain agitators in the Union and outside of the Union who were against all kinds of fishing on the Columbia River except gill netting, and they were particularly antagonistic to all kinds of fixed gear and particularly traps, and they made it their business to make life a burden to trap fishermen as far as they could and particularly in places that were peculiarly exposed to their incursions, and that locality down there being the best fishery in the lower Columbia, that is that neighborhood, the gill net fishermen naturally congregated there, especially at certain parts of the time, and it was an easy matter for them to make raids on the trap fishermen and raise the dickens with them and they did do it.

Q. You mean they pulled the traps out?

A. No, sir, they used to come in and assault the men on the pile drivers and threaten to hang them. They never pulled any traps out that I know of. They pulled some pile drivers loose at one time and may have cut some off but I don't know of pulling any piles except in this one place.

Q. The space occupied by fish traps, on Site Number Three, is right in the fairway ground to gill netters?

A. No, the gill netters carry on their fishing further off [273] shore. Of course some drop their



(Testimony of H. S. McGowan.)

nets in along the beach sometimes, but the bulk of the fishing is done further off shore.

Q. On this day that you and Mr. Bagnall, assistant to the engineering department of the United States, went down to visit these set nets, the gill netters were outside of their ordinary drift?

A. They were where they usually fish.

Q. And that was so close in you could not see the set nets; you could not get to the set nets?

A. No, the gill netters were out in the stream.

Q. How much did the boat draw?

A. I would say from her looks, 8 or 9 feet of water.

Q. These buoys you say were in 8 or 9 feet?

A. The inner shore buoys were in about 4 or 5 feet, and the off shore buoys were probably in from 8 to 15 feet of water.

Q. And that is at low tide, too?

A. But you know boats are not anxious to ground down there where that swell is and they keep well off shore.

Q. There was 15 feet of water there at low tide and you would not say that a boat that drew only that much would be afraid to go in fifteen feet of water?

A. If all the conditions were favorable, but not down there, because they are not favorable.

Q. But you stated that the boat went away and left on account of the nets closing around?

A. No, I said she went away finally because he ended his view of the situation and the gill nets were drifting in by the tide and congregating thicker

(Testimony of H. S. McGowan.)

around the boat and to avoid being entangled he got out.

Q. So you say now that a trap built in front of Site Number [274] Three, three hundred feet from the shore, would not be in the regular drifting ground used and employed by the gill net fishermen?

A. It would be probably where some drift at times.

Q. I am talking about where they habitually drift, the gill netters.

A. The proper drifting ground is further out, although some drift right in; I have seen them throw their nets onto the beach.

Q. As a matter of fact, when you are seining, you are bothered more or less with gill net fishermen drifting down in front?

A. Oh, yes, it is quite an annoyance frequently.

Q. And these buoys you put out would interfere with the gill net fishermen to a large extent, wouldn't they?

A. If they drifted into them, they might get entangled.

Q. How far were your outside buoys from the shore?

A. Well I could not say exactly, I presume 300 or 400 feet, maybe.

Q. You remember now that you testified that your inside buoys were 50 and 100 feet from shore?

A. That was merely an estimate.

Q. But you say your set net would be only about 100 feet long?

A. Oh, no, probably three to four hundred feet off

(Testimony of H. S. McGowan.)

the beach, the outside buoys.

Q. How long did you propose constructing the set net?     A. Probably 50 to 60 fathoms.

Q. That is about 300 or 340 feet?

A. In that neighborhood.

Q. So that if your inside buoy was 100 feet from shore, your outside buoy would be in the neighborhood of 400 feet at least from the shore? [275]

A. That would be about it.

Q. That is about as far out as these traps extended, isn't it?

A. The traps used to go out anywhere from 300 to 500 or 600 feet.

Q. So you would have met with the same trouble had you continued the operation of these set nets that the former gentlemen encountered when they attempted to operate traps?

A. Our gill net friends are a little changed at heart now from what they were in those early days.

Q. That is a fact, is it?

A. It is a fact that they are not so destructive as they used to be.

Q. Is not that because they put the traps out of the way from annoying them?

A. In a certain sense, but not absolutely. They destroyed our traps below Fort Columbia and above Fort Columbia in 1884 and we reconstructed them and used them ever since and they never have destroyed them since.

Q. Now, to be just absolutely honest, don't you know that the reason why the traps have not been

(Testimony of H. S. McGowan.)

built south of Sand Island in front of these sites is simply because the fishermen would not allow them to be there?

A. No, that is not true, but it is true that we fishermen generally feel that the gill net fishermen would annoy them. To what extent, whether to the extent of tearing out the traps, I do not know.

Q. They would assault them and harass them as you have stated to such an extent that they could not maintain the trap there?

A. No, sir, that is not true. They did the same thing in Oklahoma but the fishermen maintained the traps and continued to. [276]

Q. That is the reason that people don't build traps?

A. That is not the only reason.

Q. That is one of the considerations? A. Yes.

Q. Isn't that the best trap ground in Oregon?

A. I guess possibly it is, as good as any. I do not think there are any good trap grounds in Oregon.

Q. Well, you can call them in Washington. As good as any on the Columbia River?

A. Yes, maybe.

Q. Then why don't the people put traps in there?

A. Because they were using it for other means.

Q. Trapping is not half as expensive as seining?

A. Generally speaking it is not.

Q. For what reason do they expend twice as much money fishing by seines when by spending one-half as much they could fish it equally as well with traps?

A. As I said before the troubles with the fishermen was the element in the first instance, and they got in



(Testimony of H. S. McGowan.)

the habit of using seines instead of traps, and it has probably continued, not altogether for the reason that it is more profitable to seine, but it is the system they got into and people are apt to follow a system for a certain time before they change.

Q. Don't you think you would be somewhat annoyed and harassed if you had maintained those buoys out 400 feet?     A. That may be.

(Witness continuing:)

The law allows gill netting to begin on the first day of May of each year and generally it does not become profitable for an average fisherman to begin until along late in June, or some time in June. When I operated seines on Site Number Two they [277] varied somewhat in length. We had seines as short as 180 fathoms and some as long as 260 fathoms. I think the seines running from 200 to 210 fathoms were used more than any other seines. The difference in the cost of a seine and a gill net depends upon the size. Take a good, first-class average seine and a good, first-class average gill net, I suppose the seine would be somewhat cheaper. The gill net of standard depth draws 25 or 26 feet of water. Everything brand new would cost, I suppose, about seventy-five cents a fathom, and a seine of similar depth would probably cost—well, I don't think there would be much difference. In order to have operated these set nets of mine I think it would take about eight men.

I think it would take eight men to operate the nets themselves. I think it would average about a net to a man, by operating them altogether it would take

(Testimony of H. S. McGowan.)

about a man to a net. One man alone could not operate one single net by himself with as good advantage as two men with two nets contiguous. But I think it would require eight men to handle these eight set nets. In addition to that you would have to have nets and gears and boats, and you would probably have to have a small launch to make it convenient and profitable. The object of that would be that you cannot have eight men all working at one job in the most economical way and have them away from home where they would have to come miles and miles to get supplies, and the kind you get that they would constantly use to prepare fish for market. This also, of course, applies to seining as well as gill netting. When we operated seines on those grounds we did not use a launch, the only launch was the cannery launch that took the fish away and brought our supplies. They came on the regular cannery company launch and the outfit had two wagons part of the time and horses that they used for seining. You can operate two seines, one 1,200 feet long by employing seventeen men at \$70 a day, or around that sum. I [278] do not think you could employ eight men for \$30 a day. I said eight men were the only expense and figuring a launch with one extra man figured at \$6 a day. I made the contract with eight men for the season. We would get our provisions from the cannery. Generally speaking, it would cost about \$80 a day to operate two seines 1,200 feet long on Sand Island, and would cost about that in 1905, '6 and '7.

Mr. FULTON.—Q. When you obtained these Ore-

(Testimony of H. S. McGowan.)

gon set net licenses, did you post any notice on the bank or shore of Sand Island?     A. No, sir.

Q. Did you post the number of either of those licenses on the shore?     A. No, sir.

Q. You did nothing under those licenses whatever excepting to hold them?

A. The only thing I did was to make the preparations to put licenses out on the location ground, and then the injunction came out and I quit.

Q. You intended to put them on the ground?

A. I intended to establish them out there, providing it was necessary to protect my rights.

Q. You intended to put the number on the ground?

A. I would if I found it was necessary.

Q. You had not yet found it so?     A. No.

(Witness continuing:)

The only notice I gave or the notice as posted were the numbers of our Washington licenses on the buoys, and also on the bank, accordingly as I have heretofore testified. I do not recollect whether I put the Washington license numbers up before or after I knew who was the successful bidder for these sites. [279] But I apprehend it was very shortly after the issuance of the licenses, April 1, 1908. I would probably receive these licenses a couple of days after they were dated and would require a day or so to put up the notices. I presume several days at least might have elapsed after the date of the licenses until I put up the notices; that is, the Washington notices. My recollection is I posted the notices as



(Testimony of H. S. McGowan.)

promptly as possible after I received them, and in the same manner as I had previously done.

**[Testimony of G. B. Hegardt, for Defendants  
(Recalled).]**

G. B. HEGARDT, being again recalled by counsel for defendants, testified in response to interrogatories propounded by counsel for defendants as follows:

(Interrogated by Mr. DORR:)

The Oklahoma channel referred to in the testimony herein runs in the north and west direction and follows the Republic spit on the west side of Sand Island and the southwest corner of Sand Island. Republic spit is shown on this chart, Defendants' Exhibit 5, as being attached to Sand Island. That portion of the channel that laid between Republic spit and Sand Island proper was what has been referred to as Oklahoma and Oklahoma channel. That channel is not there now; it has shoaled up, filled in. Referring to Defendants' Exhibit 5, a chart upon which I have delineated certain lines, these soundings were taken in 1896 and [280] covers practically the territory north of Sand Island lying between Sand Island and the Washington shore; that covers a large expanse of flats and that portion of this chart referred to in the footnotes as being from the survey of the United States Engineers, 1907, covers only the bar proper, the territory lying between the Oregon shore and Sand Island and continued up to Sand Island as far as Fort Stevens. In the footnote it says: "Topography executed between 1868 and 1892,



(Testimony of G. B. Hegardt.)

and hydrography between 1868 and 1899." That means the general survey of this chart was made in 1868 from the Pacific Ocean, taking in the Lewis & Clark River and the Columbia River estuary on the Washington side to Knappton. The process is that the United States Coast Geodetic Survey corrects all information received and puts on the date when received. Since 1868 no survey has been made of the Lewis & Clark River or Youngs River or Youngs Bay. The soundings taken in Bakers Bay were on the survey in 1896, and this footnote states that the "Hydrography was executed between 1868 and 1899." The 1899 soundings were taken from Astoria and east in connection with the bounds of the river above Astoria, but the main channel from Fort Stevens west and out to the Pacific Ocean were taken in 1907, and no survey was made of Bakers Bay since 1896; so that the soundings and depth of water represented on the map in Bakers Bay are of 1896. But generally what we call the annual bar survey only covers territory from Fort Stevens and west to the Pacific Ocean. The first and immediate effect of the jetty on the water at the bar was to sweep away what is called the middle sands located at the mouth of the river which divided the entrance to the river into two channels, north and south, and one channel was formed which has ever since remained. The middle sands at the time the construction of the jetty began was about eight or nine feet at low water. These sands have been swept away and the depth of water at that point is now from 24 to 35 to 40 feet deep.

(Testimony of G. B. Hegardt.)

This map, Defendants' Exhibit 5, does [281] not delineate Sand Island as existing from an actual survey made in 1896. The custom has been to make a complete survey of Sand Island for every annual report and survey, while the territory of Bakers Bay has not been sounded. That was to keep track of the movement of Sand Island and also for the purpose of checking the cross-sections of the river between Sand Island and the jetty. So that Sand Island has always been surveyed every year for that purpose. These dotted lines surrounding Sand Island represent the limiting lines by the engineers in the early nineties; that provided a clear way or passage in which no traps or gear could be constructed. They could not be constructed within the limiting lines; that is between the limiting lines or channel lines that defines the channel. I refer to those lines in Bakers' Bay and those lines were established for the purpose of providing an unobstructed channel from the Columbia River at the head of Sand Island and Ilwaco and Fort Canby, and between those limiting lines defining the channel no obstruction could be placed. That is, no obstruction could be placed outside of those dotted lines surrounding Sand Island.

Sand Island is delineated on this map, Defendants' Exhibit 5, according to a survey thereof made in 1907. The blue line marked "boundary line as claimed by the State of Oregon" as delineated on this map was taken from the map put in evidence by the State of Oregon in the suit brought by the State of Washington against the State of Oregon to establish the

(Testimony of G. B. Hegardt.)

boundary line between the two States in that vicinity.

**Redirect Examination.**

**Q.** These section lines extending over this territory cover Sand Island and the main channel (Defendants' Exhibit 5) I understand have simply been placed on this plat. They do not represent actual land surveys? [282]

**A.** No. There was no survey covering Sand Island.

**[Testimony of J. P. Coyle, for Defendants.]**

**J. P. COYLE**, a witness called on behalf of the defendants, after being first duly sworn, testified in response to interrogatories propounded to him by counsel for defendants, as follows:

(Interrogated by Mr. DORR:)

My name is J. P. Coyle. I am one of the defendants in this action. I reside at McGowan, Washington, and have lived there about fourteen years. I am the same J. P. Coyle who held the three fishing licenses for set nets issued by the State of Washington on or about April 15, 1908, which were referred to by Mr. McGowan in his evidence. I am a fisherman by occupation and have followed that calling for about twenty-three years on the Columbia River. I have been engaged in trap fishing and seining for salmon fish on the lower Columbia River. I know the territory or character of the land commonly called Sand Island, and have been acquainted with it since 1903. I fished there in 1903; I never knew the island before that and had never seen it. In 1903 I seined



(Testimony of J. P. Coyle.)

for a seining outfit by the name of Goodnough & Lindberg. I know in a general way the location of the so-called sites numbered two and three on the south side of Sand Island and know where the boundary lines are on the ground.

Q. What did you do if anything towards making locations under the three set net licenses which you held in 1908? A. I put down anchors and buoys.

Q. Whereabouts?

A. I put down the inner anchor about five feet from the shore line at low water.

Q. Above or below?

A. Below; out towards south channel and made it fast with lock and chain and wire cable; a wooden buoy with a number [283] attached, one for each set net, one inside and one outside.

Q. How many to each location?

A. Two buoys to each location.

Q. One on either side? A. One on either side.

Q. Where was the outer end of each location with respect to the shore line, further in or further out?

A. It was three hundred or thereabouts from the inner buoy out south.

Q. How were these buoys marked, if at all?

A. Marked with large letters on a wooden board, with a light or white background, and black letters.

Q. What were the letters?

A. They were numbers, about six or seven inches long.

Q. What were the numbers; what did they repre-



(Testimony of J. P. Coyle.)

sent? A. They represent the location for a set net.

Q. What connection if any did the number of the licenses have with the number of your buoys?

A. You had to put your number on the buoy in order to establish that you intended that for a set net location.

Q. Did you put the same number that your licenses carried on your board? A. Yes.

Q. How many locations did you so establish or locate? A. Three.

Q. Who was out there with you at this time if anyone? A. Mr. Lindstrom and Mr. McGowan.

Q. Mr. Lindstrom is the other defendant?

A. Yes, he and I placed the anchors.

Q. Henry McGowan, likewise the defendant in this suit? A. Yes, sir.

Q. You were all there together; do you remember the day? [284] A. I think it was in June.

Q. You don't remember the exact day of the month? A. I think about the middle of the month.

Q. How soon after you obtained the licenses was it?

A. We obtained the licenses on the 15th and it was right after. Not immediately after. By the time we made our anchors and cables which took us several days; maybe a week.

Q. How much of a task was it to prepare these anchors and cables and buoys?

A. It was quite a little task. We had to drill a hole through the rock, which weighed three hundred pounds, something that could not be dragged away

(Testimony of J. P. Coyle.)

easily, something to establish an anchorage. We drilled holes through and put the chain through the rock and then back up around to the other part of the chain, with a clamp. Wire was connected to it and made quite tight. We had three rocks for each location.

Q. Do you know what those anchors were reasonably worth?

A. I don't know; it took quite a little to drill them.

Q. Where did you get the rocks?

A. We got them on the beach in front of the cannery, from the jetty.

Q. Did you find them on Sand Island?

A. No; in front of McGowan's cannery on the mainland of the Washington shore.

Q. And took them out how?

A. In a boat and took them down to the location in front of Sand Island and placed them.

Q. How much labor would be necessarily expended on each of them? [285]

A. They must have cost us, wire cables and all, about fifty dollars, with the labor.

Q. How many of the anchors did you all three take out?

A. We took enough for the eight locations.

Q. That would be 16? A. Sixteen.

Q. Were they all placed there? A. Yes, sir.

Q. Were they all placed on the same day?

A. All placed on the same day.

Q. And you had three? A. I had three.

(Testimony of J. P. Coyle.)

Q. How many did Mr. Lindstrom have?

A. Three.

Q. And Mr. McGowan?      A. Two.

Q. Were they all below the line of low tide?

A. All below the line of low tide.

Q. Did you actually fish those locations?

A. No, we hired men to fish them. We were making preparations to fish them with nets. We had two men to start operations.

Q. Where were these men?

A. They fished along there, yes, at the location grounds of the set nets.

Q. Did you actually put in your nets and fish the locations in 1908?      A. Yes, we started the nets.

Q. Had you actually got your nets on the ground?

A. We got in one net.

Q. Why did you quit?

A. We were stopped by the injunction.

Q. In this suit? [286]      A. In this suit.

Q. Did you have any other reasons for stopping?

A. No.

Q. After these buoys were anchored out, did they remain there?

A. No, I understood they were removed once or twice; we replaced them twice and some of them were replaced a third time. I don't know just how many.

Q. Did you know personally who took them out?

A. No, not personally.

Q. How many years had you been acquainted with that fish place before 1908?      A. Since 1903.

Q. Had you fished there?

(Testimony of J. P. Coyle.)

A. Yes, sir, I seined there in 1903.

Q. And each year since?

A. No; I have fished there some years but the last few years I have not.

Q. Did you ever do anything yourself towards clearing that ground?

A. I cleared that ground when Mr. Brumbach owned it once. I did it for him.

Q. What year was that?

A. It must have been 1900 I think when Brumbach,—or it might have been 1899.

(Witness continuing:)

In 1900 or 1899 Brumbach occupied that territory seining for salmon. After that he sold out to McGowan, and I cleared part of the trap location for P. J. McGowan and Sons. There were piles in there which obstructed our seines and I cleared them out. I know of two fish traps being operated on that ground. I operated one of them. The reason I quit was that the sand filled [287] on that point and closed those traps on the island. Afterward the channel washed away and those pile stumps were exposed as the island went north so that they were an obstruction to seining. One of these traps I think was operated two seasons, the upper one, that is the easterly one, and the other one was operated three years to my knowledge. I don't know how long before that time. A salmon trap is constructed by driving piles in the bottom of the river, the lead is drove straight out according to your current, and then there is what you call the heart, the row of piles



(Testimony of J. P. Coyle.)

in a heart shape, which is supposed to hold the fish and corral them. The heart is at the outside end of your lead, or if it is a double trap there is one lead on each end, and the pond or pot as they call it, is drove outside of the heart. In the Columbia River traps the pot is drove on the upper side of the heart and at the entrance of the heart into the pot; the heart connects with the pot by web and there is a gate in the lead from both sides and the web connects there leaving a space of eight feet on each side. The cotton web is put on these piles. The pot has two spaces which are called gates to let the fish in and that is made out of cotton web. The fish go into the lead, then through the gate into the heart. The heart is so constructed that it will lead the fish up to the entrance and into the pot. The piles are driven on the slant of the current to lead them into the pot. The traps are of different length, some from 300 feet to six or seven hundred feet long. I have been referring to the Columbia River.

I think I know what it would reasonably and probably cost to operate these set net locations, which I have testified to, per season. We had an arrangement to operate them together. We each had our own locations. It would take two men to operate two locations as they should be worked, and a man would cost \$3 a day, and it would take eight men to operate the eight locations [288] and somebody to take care of them at night and watch them; then you would have to have four boats, small boats, to operate eight nets, and two boats at least to take care of your

(Testimony of J. P. Coyle.)

fish, with the assistance of a launch to handle the fish and bring them to the station and so forth, or take your nets to the rack for repairs, and carry the men to and from their work. You should have two nets for each location because you cannot keep a net in the water all of the time. They get more or less broken and have to be repaired and while one is being repaired you could use the other. You would have to have about sixteen nets to operate successfully and to put these nets in would cost in the neighborhood of \$500, if not more, and this would be the cost for the entire sixteen nets. That means, of course, that the net should be fully equipped with cork and lead lines; then your labor, eight men at \$3 a day for about two months; three dollars a day and they board themselves. I figure that the actual cost of these nets and to operate them those two months would cost about \$3,000. That is taking the fishing season for one year. The fishing season opens on the first of May but the net locations are not profitable to fish before the last of June or the first of July. The fishing season closes on the 25th day of August. I had intended in good faith to operate these locations in 1908, and was making all due and reasonable preparations to that end. I think I know the market price of fish in 1908. I think small salmon was five cents and large six cents in 1907. That is five cents a pound for cannery salmon and six cents a pound for larger salmon delivered at the station, that is at the cannery station. In some instances cannery launches would come and take the fish from the grounds, they gen-

(Testimony of J. P. Coyle.)

erally did that at the seining grounds, and you generally have gathering stations on your own grounds, and the prices I have just quoted is the price of fish on the grounds. [289]

Q. Judging from your knowledge of the run of fish at this location in June are you able to state what the reasonable amount of the catch would have been in tons per year per season in 1908, 1909, 1910?

To this question counsel for the plaintiff objected upon the ground that it was incompetent, irrelevant and immaterial, and that the witness was not competent.

A. These eight nets, according to my opinion, if successfully operated, would get over one hundred tons of fish for the season, and that would be true for each of the said three years, and I believe according to the fish caught there the last two years it would be more. The character of fish caught on these grounds during said time were Chinook and steelheads. Chinook is supposed to be the best fish in the river. Steelheads are not so high priced as Chinook, it is more of a cold storage fish. The Royal Chinook commands the highest price. There is no salmon which commands a higher price than the Chinook. The prices that I have given is the average of all the fish marketed down there. During the years 1908 and 1909 the price was higher. Cannery salmon were six cents in 1909 and larger salmon were seven cents, that is salmon over twenty-five pounds. In 1910 small salmon, if I remember right, was six cents and large salmon seven and a half cents, and in some cases



(Testimony of J. P. Coyle.)

they paid eight cents.

The expense of operating, in my judgment, would not have varied materially during these years. The expense of operating would be about the same each year.

Q. The only difference then in the situation would have been a higher price for fish during the years succeeding 1908?

A. Yes. The same price for operating but a higher price for fish. [290]

Cross-examination.

(Interrogated by G. C. FULTON.)

I am working for P. J. McGowan and Sons and have been working for them for about fifteen years on a salary. I am employed the year round. I was working for P. J. McGowan in 1908 on a salary. I made sixteen of these buoys and they cost altogether \$50. I did not pay for them; my labor went into them, and that is all it cost me. I was paid by Mr. McGowan my regular salary during the time I was employed in making them. I made all of these buoys in the daytime, and at that time I was drawing my regular salary.

Q. What do you mean then by paying for them with your labor when McGowan was paying you by the month?

A. I mean this way, that I have shared in the expense of that location and have done so. I have never paid anything yet. Mr. McGowan has never furnished me a bill of the costs, and I have never asked him for a bill.



(Testimony of J. P. Coyle.)

The defendant Lindstrom is also a fisherman and he also worked for P. J. McGowan and Sons. I don't know whether for a salary, wages, or how.

Mr. McGowan first suggested putting out these set nets on these grounds. He told me that set nets could be operated at Sand Island. He did not come to me and say that we could get them, but that there was a show for set nets on Sand Island. I said if there was a show for anything like that I wanted to take one. I said I would take one or take what I could legally fish. Mr. McGowan did not tell me that he wanted to fight the Columbia River Packers' Association. It was this way, the two States were having trouble and there was a chance for set nets in front of Sand Island; a chance to get a fishing ground and make something. I did not understand I was to cork anybody, and I supposed I had [291] a right to fish on the river. At the time I knew there was a seining party had a license on the south shore of Sand Island from the Government.

Q. And you knew that by putting these set nets in there where it was proposed to put them, that it would cork these seining rights on Sand Island?

A. One is on the shore— (Interrupted.)

Q. Answer the question.

A. That it would cork them you say?

(Question read.)

Q. Did you ask him who it was proposed to cork?

A. No.

Q. Did you say anything to Mr. McGowan as to

(Testimony of J. P. Coyle.)

where or whose seining rights it was proposed to cork? A. No.

Q. Did he tell you whose seining rights it was proposed to cork? A. No, sir.

Q. Didn't you know it would involve you in litigation or a lawsuit? A. It might.

Q. You thought that did you; did you say anything to McGowan about it? A. No.

Q. Was there anything said there about putting in these set nets when Mr. McGowan first spoke to you? A. No.

Q. Only what you have stated? A. No.

Q. That was all that was said? A. Yes.

Q. Did you know what grounds, or in front of what grounds, it [292] was proposed to put these set nets? A. I know my ground.

Q. At the time Mr. McGowan spoke to you first, did you understand in front of whose grounds or seining right it was proposed to put these set nets?

A. I don't know of any seining right. I know I was going to get a set net license in front of Sand Island.

Q. And you knew Sand Island had been rented by the Government to different parties for seining purposes?

A. They had begun to for the last few years.

Q. And you knew that the Government had executed leases for seining rights in front of Sand Island? A. For a few years, yes.

Q. You knew that at the time Mr. McGowan came to you, that the entire frontage of Sand Island had

(Testimony of J. P. Coyle.)

been leased for seining purposes? A. Yes.

Mr. DORR.—I object to this as being incompetent, and not in harmony with the lease introduced by the plaintiff. No evidence in this case that the Government ever leased anything below the line of low tide.

Q. Knowing that these rights had been leased and that you proposed to put these nets in front of these leased rights, you tell the Court you had no curiosity as to who the individual was that you proposed to cork? A. No; I had none.

Q. You had no curiosity whatever?

A. I want to state that I had a right to fish the Columbia River with set nets as long as I did not touch their land, and I still think I have that right.

Q. So you didn't bother as to whether it was some personal friend or some enemy? [293]

A. No, I supposed I was holding my rights.

Q. Did it make any difference if some personal friend of yours had obtained the lease from the Government, you proposed to put your set nets in front of his ground regardless of whether he was a friend of yours or whether you were corking him or not?

A. I have the right.

Q. You were perfectly willing to do that?

A. Yes.

Q. You didn't take into consideration who the party was?

A. It made no difference; it was a business proposition.

Q. You did not know it was in front of the Columbia River Packers' Association? A. No, sir.

(Testimony of J. P. Coyle.)

Q. You knew of course that you might get into a lawsuit in case you did that?

A. I did not know but I might.

Q. You thought so and figured if you did you might get into a lawsuit? A. It might be; I don't know.

Q. But you didn't say anything to McGowan about that?

A. No, I did not. I thought I had the right.

Q. Why didn't you, while Mr. McGowan was fishing these grounds, why didn't you put set nets in front of his place, since you knew you had the right?

A. The idea came to me on account of this trouble with the two States.

Q. When McGowan was there, the trouble was on?

A. I don't know about that.

Q. You don't wish to be understood that simply because there was trouble between the two States, the law would be different? [294]

A. There might be difference in the waters and the channel.

Q. That is, you would have to cork anyone fishing in Oregon but not in Washington?

A. The boundary might throw the piece of land in this State, that used to be in that State, and would change the fishery so that a man might hold it.

Q. In other words you wanted to steal it?

A. No.

Q. If held to be in Washington, it would still belong to the man who fished it?

A. I don't know; it don't look that way to me.

Q. Suppose it had been in Oregon; would it still



(Testimony of J. P. Coyle.)

belong to the man who fished it?

A. I don't see it that way.

Q. You knew they had been fishing there right along?     A. Yes.

Q. And claimed to have the right?     A. Yes.

Q. And by putting your set nets there you were stealing it?

A. No; I was simply exercising my rights as a set net location. The State allows me a license and I am not stealing when I fish.

Q. As I understand your position, you claimed at that time under the laws of Washington, if one was fishing a seining ground and had his notices up you had a right to go out in front of him in his ground, and put down set nets and maintain them?

A. I had a right to put down set nets wherever I got a location.

Q. That is not the answer.

A. Sand Island did not belong to anybody. It is a different proposition. You buy the seining ground from the Government [295] but Sand Island don't belong to anybody. I have a right to set nets there as well as any seiner.

Q. Why didn't you exercise that right before?

A. When the trouble came up about the two States, if I had a set net location and fished it, I had a chance to own it.

Q. Why did you confine it simply to the front of Sites Two and Three?

A. I confined it to that place where I picked out for my advantage.

(Testimony of J. P. Coyle.)

Q. If it was such a good proposition, why didn't you extend it along the entire front?

A. I had all I could handle then.

Q. Did you pay Mr. McGowan or anybody else for the employment of these two men?

A. I guess Mr. McGowan paid him; I contributed my labor.

Q. Now did you pay?      A. No, I did not.

Q. Was any bill rendered to you for it?

A. Not yet; it is not settled yet.

Q. Did you order personally any nets to fish your three seines?

A. No. Mr. Lindstrom and I ordered the depth and length that we were supposed to fish.

Q. Did you order the nets?

A. We gave the order to the company.

Q. Did you order them?

A. I ordered the company to put what kind of nets.

Q. Did you sign the orders?      A. No.

Q. Did the company charge you with this net?

A. The company were charged I guess.

Q. You were expected to pay it?

A. Our expense. [296]

Q. You would have been expected to pay for the nets if the company furnished them?      A. Yes.

Q. And you understand that the company was to order the nets and charge you with the expense of the nets?

A. That is the habit with the cannery along the Columbia River.

Q. That was your understanding?      A. Yes, sir.

(Testimony of J. P. Coyle.)

Q. And thus far you have not been furnished with any expense account whatever?

A. We have had the expense of these buoys and making the preparations of those nets.

Q. You have been charged with it?

A. It is not settled yet.

Q. Who paid your expense up here as a witness?

A. I did myself.

Q. Did Mr. McGowan furnish you any money for that?

A. Anything he furnishes me is charged up to my account. He did not furnish any.

Q. Did he agree to?      A. No.

Q. Did he say anything about it?

A. No. My expenses go to the company when I work for them, and when I leave them I pay my own expenses.

Q. Do you expect McGowan to pay your expense?

A. P. J. McGowan to pay my expense when I am in their employ.

Q. You expect them to pay your expense up here as a witness in this case?      A. No, I do not.

Q. Why not?

A. Because I have this license in my own name.

[297]

Q. You expect to pay all of your expense up here and back and not to make any claim to P. J. McGowan & Sons?

A. My expenses will come out of these set nets when that question is settled.

Q. Suppose it is settled against you?

(Testimony of J. P. Coyle.)

A. If it is, then I guess that is my loss.

Q. You don't expect McGowan and Sons to pay you anything for your expenses up here?

A. I don't know whether they will or not.

Q. What is your anticipation about that?

A. I don't know.

Q. You rather think they will not?

A. They may or may not; I have not asked them that question. The question was never put to me.

Q. By the way, these nets you ordered for those set nets, were how long?

(Witness continuing:)

The set nets which were ordered would hang about 300 feet in length and would weigh in the neighborhood of 120 pounds when dry. They were about 24 feet in depth. I have made set nets and put the lead on about every 14 inches according to the current. Each piece of lead would weigh about three ounces; I don't know exactly. I think that if the net was wet it would weigh, cork and lead lines together, about 300 pounds. I did not see any set net fishing south of Sand Island. I was not there. I did not know whether they got any fish or not. I started to operate in the middle of June and had, as I understand, about five days of fishing, but I do not know whether any fish were caught or not. I was not sufficiently interested in fishing there to inform myself whether or not my set net was fished or whether it caught any fish.

Q. How did you propose to anchor the lower end of your set net, these lead lines? [298]



(Testimony of J. P. Coyle.)

A. We fastened them to the wire cable.

Q. At the top? A. No, at the bottom.

Q. How would you get down there?

A. Raise your anchor.

Q. Your idea was to raise the anchor and tie the lead line to the anchor? A. Yes.

Q. Not to the wire cable?

A. To the wire cable at the anchor.

Q. To operate the set net, you would have to anchor the lead line at the bottom of the river?

A. Yes.

Q. And the cork line on the surface of the water?

A. The cork line don't have to be made fast on top, as long as your lead line is fast.

Q. You think that an anchor weighing 300 pounds would hold a net weighing 300 pounds.

A. The anchors would be 600 pounds, one on each end, and you must remember your set nets, when you put them down, you rock them down when there is a strong current. The little lead line *line* you have on the gill net will not hold the set net; you must put rocks to hold them in position, because it has to be stationary. For the set nets you must put the rocks.

Q. Heavy rocks?

A. Well, small rocks, 4 or 5 pounds weight, like a trap.

Q. How many?

A. According to your current.

Q. You know there is a very swift current by there?

(Testimony of J. P. Coyle.)

A. Only for about two hours, in the first of the ebb; that is the only time it is swift. [299]

Q. Did you provide for rocks to anchor at the bottom?

A. We did not get a chance to get to that part.

Q. You had several days, didn't you? A. No.

Q. You insisted on putting these anchors back in there?

A. We had to put them in to hold our location in order to get ready.

Q. You had found them to operate?

A. We did not figure on operating until the 1st of July, or the last of June.

Q. So you got no rock to make the anchors?

A. We had rocks handy.

Q. But you did not need them?

A. No, we were getting it.

Q. But did you get it? A. Not on hand.

Q. Did you ever operate a set net in front of Sand Island? A. No.

Q. Did you ever know of anyone operating any there? A. No.

Q. You don't know whether it is practical or not?

A. I think, in my opinion, it is.

Q. But you don't know.

A. I never got a chance to try.

Q. And therefore you don't know; you are only guessing?

A. I don't see why it is not as good a fishing place as any.

Q. Then if that is true, and you knew you could

(Testimony of J. P. Coyle.)

catch eight tons of fish with these three nets all these years, why didn't you put them in before and get the money?     A. I didn't know it.

Q. And not work for wages all your life?

A. I didn't know it then; didn't think of it. [300]

Q. Mr. McGowan was the man who suggested it?

A. Lots of men don't think of such things.

Q. You were familiar with the ground out there and knew nobody had any rights out there; it was everybody's territory?

A. It was, and still is, I think.

Q. Why was it that it happened to be in front of Sites numbered Two and Three that these set nets were placed?

A. That is the best set net ground; we did not want to put them in a poor location.

Q. In front of which site did you put your three set nets?     A. In front of Site Number Three.

Q. You heard Mr. McGowan say that he thought the best were in front of Sites Two?

A. I guess it is; I won't dispute his word on that.

Q. So, as a matter of fact you did not get the best set net location?

A. No, but I got the next best I could, though.

Q. Now, these set nets are only three hundred feet long?     A. Well, they may be more.

Q. You put in the order?

A. About 300. They might run 350.

Q. You have an order for the nets you said; how long were they?     A. Well, say 300 feet.

Q. What do you say?

(Testimony of J. P. Coyle.)

A. I will say 300 to settle the account.

Q. You estimate that these nets 300 feet long, your three nets, would catch as many fish as two seines that were 1,250 feet long, operated at the same place; that is your estimate, is it?

A. I don't know about that; I know what I estimate the set nets would catch if properly worked.

Q. About 300 tons? A. Yes. [301]

Q. And the seines they tell me only caught about 80 tons, as testified to by Mr. McGowan, and they were about 1,250 feet long. Explain why you think that the three set nets only 300 feet long, to be tied down stationary, and the only way to catch fish would be to gill them, would catch 100 tons, whereas the seining operation which cost about one hundred dollars a day to operate, only caught about 80 tons.

A. You misunderstand me. I mean on the eight locations. I don't mean just the three.

Q. Well, about how many tons of fish did you estimate your three set net locations would catch?

A. My three ought to get about thirty tons of that.

Q. Where did you ever operate set nets?

A. North River.

Q. That is a little bit of a tidal stream?

A. Well, you can't jump over it.

Q. How wide?

A. It is about 400 feet across the stream.

Q. How long was the net you operated?

A. Oh, about 100 feet.

Q. And how many tons did you catch there in the season? A. I don't know; I did not weigh them.



(Testimony of J. P. Coyle.)

Q. What made you quit?

A. I was fishing it for P. J. McGowan in the North River. We used it in our trapping.

Q. How long did you operate it?

A. I operated it one fall.

Q. Did you ever operate a set net at any other time? A. No.

Q. Your only experience was in North River, which is nothing more nor less than a slough? [302]

A. No, it is not a slough.

Q. You swear it is not?

A. It is a river, navigable.

Q. Is it navigable beyond tide water? A. No.

Q. You can jump across it above tide water?

A. Yes, but those set nets were not above tide water.

Q. It is just what you call a tidal slough?

A. Well, you can't walk across it.

Q. But when the tide is out, you have no water there?

A. Oh, yes, there is water there.

Q. How much?

A. Right at that location there is about eight feet of water.

Q. But it is not navigable at low tide?

A. They come to that location.

Q. But I am talking about the river; you cannot navigate the North River at low tide?

A. You can go past this location.

Q. In what kind of a boat? A. Fish launches.

Q. I am talking about zero tide, low water; will

(Testimony of J. P. Coyle.)

you swear that North River is navigable from its mouth up to where you say your fish trap was located?

A. Yes, a fish launch can go up to that set net at low water. Those fish launches go there. It is in the entrance to North River a little ways in.

Q. The North River runs through the tide lands?

A. Yes.

Q. And its head is a small stream called North River, which you can jump across?

A. You never could jump across it as far as I know.

Q. You mean the river beyond the tide land?  
[303] A. No, you cannot.

Q. Well, it is not over six inches deep?

A. Yes, it is.

Q. It is a small mountain stream.

A. It is a small mountain stream, but deeper than that.

Q. How wide is it above tide water?

A. As far as I have been, it is say all the way from 50 to 100 feet,—50 feet is the narrowest that I have been up.

Q. How far were you up? A. Two miles.

Q. What is the average depth?

A. I did not sound it.

Q. But you could see it?

A. I could see with my eyes.

Q. It is just *line* one of these average streams, about fifty feet wide?

A. Fifty or one hundred feet.

(Testimony of J. P. Coyle.)

Q. It is just like one of those mountain streams and leads into the tide land? A. Yes.

Q. And then you come to this broad, wide, deep place, and you operated a set net one fall in this North River; that is the only experience you had in operating set nets? A. Yes, sir.

Q. What makes you think that you could catch about thirty tons with these three nets?

A. A fisherman understands his business and ought to know.

Q. But your experience is only limited to one fall fishing on North River?

A. I fished 20 years on the Columbia River, but only one fall with set net and traps is where I had experience with all kinds of gear. [304]

Q. You operated a set net one fall season on the North River?

A. A fisherman doesn't have to have ten years' experience; one is sufficient.

Q. And that is the reason you could probably catch 30 tons with your set nets, based upon your experience as a fisherman one fall fishing on the North River, when you don't know how many fish you caught?

A. I could not keep count; I was working for wages; but I delivered the fish, that was all there was to it.

Q. As a matter of fact, those nets which you claimed you were getting ready to order for these three alleged sites that you took up in front of Site Number Three, never were ordered and never came?

(Testimony of J. P. Coyle.)

A. They never came; I don't know; we had the web there at the cannery.

Q. They always kept sufficient quantity?

A. Some kinds.

Q. But they were never manufactured?

A. They were never completed, you mean?

Q. Were they ever started? A. Yes, sir.

Q. Who started them?

A. That gentleman there, Mr. Lindstrom.

Q. He started them? A. Yes.

Q. How much work did he do on them?

A. He worked,—I don't know how much. I know he started to get the web ready to hang.

Q. Do you know whether he started to hang it?

A. I don't know.

Q. The web was already made?

A. Well, yes, but you must make the nets. [305]

Q. What did he do?

A. I guess he cut the web to suit the water.

Q. Had he hung the lines?

A. Not that I know of.

Q. Did you pay him for the work?

A. I did not.

Q. Did he put in a bill to you for it? A. No.

(Witness continuing:)

A. I did not say that I owned a fish-trap on Sand Island. The fish-trap that I referred to belonged to P. J. McGowan and it was in Oklahoma channel. It was not in front of Site Number One, but was in front of Site Number Two. I know this trap location was in Site Number Two. There was no such



(Testimony of J. P. Coyle.)

thing as sites then. At the time this trap was operated the channel was no further east than it is now. There was a channel in there between the "Republic" wreck and Sand Island and this trap was in this channel. It was southwest of Sand Island. It was west of the south point of the island and the island has since made out, bringing the trap in front of Site Number Two.

It would require eight men to operate eight set nets and one man to watch; that would be nine men at \$3 a day, which would be \$27 a day to operate. In addition to this you would have to employ a launch at a cost of six or seven and a half dollars. It would cost something to keep the nets in repair, but a very small amount.

Q. Is there a set net in the lower Columbia River in front of any sand island in the river?

A. I don't know; I am not familiar with all the river.

Q. But the portion of the river that you are familiar with, is there or was there operated during the year 1908 and [306] 1909 and '10, one single set net in the channel of the Columbia River near any sand island that you ever heard of or know of?

A. Well, no.

Q. So that you don't know whether it is a practical experiment or not, but simply you are theorizing on it?

A. I know it is very successful in places.

Q. But is it in the Columbia River channel a success?      A. Yes.

(Testimony of J. P. Coyle.)

Q. Where? A. Up the river.

Q. I am talking about the lower Columbia River?

A. I don't know.

(Witness continuing:)

The reason we did not begin operating these set nets until the latter part of June or the first of July was that fish don't generally come along the shore there early. It was not profitable and there was more or less drift in the early part of the season. That was the only reason. I only fished there one season, 1904. The only experience I have had with Sand Island was during the year of 1903 and 1904.

Q. Don't you know as a matter of fact, Mr. Coyle, that you cannot possibly maintain a set net at that place; that the gill net fishermen's seines would entangle it and take it out?

A. You could maintain it all right; the only trouble would be the gill net men interfering.

Q. Four hundred feet out from the shore would be right in front of the innumerable gill nets that come down that channel.

A. We have the same trouble that the seines have.  
[307]

Q. But they have to pull their seines in?

A. Certainly.

Q. But you cannot pull in your set nets?

A. No.

Q. So that when these gill nets come down it would just simply take out your set net anchor, wouldn't it? A. No, it would destroy their net.

Q. And about that time there would be twenty fishermen on top of you, and your anchors would not

(Testimony of J. P. Coyle.)

last long?     A. They might or might not.

Q. What is your judgment about that?

A. Well, I don't know. The fishermen are not as bad as they used to be. They are more friendly than they used to be.

Q. One of their nets costs about how much?

A. Something like two hundred dollars.

Q. They cost five and six hundred dollars, don't they, a good gill net, and by the time your obstruction cut one in two, what do you think the consequences would be?

A. I don't know; I suppose there would be trouble, as there has been before.

Redirect Examination.

(Interrogated by Mr. DORR.)

When I spoke about working in 1903 and 1904 I intended to say and meant to say 1893, and this refers to all of my testimony where I have used those dates. At the time I applied for my set net license, in June, 1908, and when I located my anchors and buoys at the places mentioned, I did not know and I had no idea that anyone had a lease from the Government or anybody else on the ground upon which I located, and when I said that I had heard that they had a lease out there, I meant that the lease might cover the island; the Government gave them a lease for the land. [308]

I had never heard, nor had anyone intimated that either the plaintiff or anyone else had any prior right for the ground upon which I located below the line of low tide. I did not consider that I was interfer-

(Testimony of J. P. Coyle.)

ing with the legal rights of anyone else. I considered my right was legal. It was state waters and I supposed that the State had jurisdiction on those waters and it was not covered by any license. Corking is a word amongst fishermen that means to lay or drift in front of another. You put your net in front of his. I put my net in front of Sand Island.

Recross-examination.

(Interrogated by Mr. FULTON.)

Q. Don't you know as a matter of fact that the State of Washington actually deeded by legislative enactment all of the bed of the Columbia River surrounding Sand Island to a depth of fifteen feet below low water to the United States? A. No.

Q. If it turns out that the State of Washington did so, and you put your buoys in eight or nine feet of water, you were putting them on the Government ground, weren't you?

To this question counsel for defendants then and there objected upon the ground that the same was calling for a conclusion of law.

A. No, I don't think so.

Q. But, as a matter of fact, if your buoys were only in fifteen feet, and not to exceed seven or eight feet of water, and the United States own to the depth of fifteen feet, you were on land belonging to the United States?

A. The inside buoy was in about six feet of water at low water.

Q. Well, the outside one was in about fifteen?

[309] A. I think so.



(Testimony of J. P. Coyle.)

Q. Then you were absolutely on Government ground? (No response.)

**[Testimony of Erick Lindstrom, for Defendants.]**

ERICK LINDSTROM, a witness called on behalf of the defendants, after being first duly sworn, testified in response to interrogatories propounded to him, as follows:

My name is Erick Lindstrom; age forty-four; residence McGowan, Pacific County, Washington. I have lived at McGowan with my family for five years, but I have lived in the State for about eighteen years. My business is fishing; I followed fishing in the old country and in this country. The first I did here was with drift net on the lower Columbia River in 1889. In 1891 or 1892 I was fishing with gill nets—I mean hooks. In 1896 I fished with set nets on the Columbia. We operated three until the time the freshets got high and we could only operate one. I operated this one about three weeks; it was about 350 feet long and was there during the high water. We used small mesh and caught big Chinook salmon. We caught about a ton and a half a day on the average; the entire season was 83 tons from these set nets and the record shows that in the cannery to-day. That was on the Columbia River in the year 1896. Set nets are constructed as follows: Where you have a shore right you fasten one end of the line to a tree or rock, and fasten that to the cork line on the net. You lay your net out and have anchors on the outside end. We use two anchors during the high water where the current is

(Testimony of Erick Lindstrom.)

strong, weighing from 150 to 200 pounds each. If I was not permitted to land on shore I would anchor the net where my right started, lay it out the same way, lay out the net and anchor the other end with a buoy and line fastened to the anchor so that I could haul it up any time when necessary. Where the current was [310] strong, that when we were running nets with an ordinary skiff, eighteen feet long, we had sometimes to let the nets go—it would pull our boats under. It would slack up a little at times, and when we could run the net successfully we had all kinds of fish. I am acquainted with Sand Island and know the territory on the south side of the island in front of what is called Sites Two and Three. In my experience I found it to be a real good place for set nets. You can fish there at almost any time, day or night. Part of the time the current was as strong there as at other places where I fished, but the biggest part of the time it is not. The only portion of the twenty-four hours in which the current is strong at Sand Island is about two hours. The first of the ebb and about the middle of the ebb tide it is pretty strong.

I am one of the defendants in this action, and am the same party who took out the three set net licenses referred to by Mr. McGowan in his evidence. I took out three licenses numbered 1433, 1434 and 1435. After I took out these licenses I made the anchors sufficient for holding the locations on the place. I put a chain through the rocks which would weigh about 300 pounds, put a chain around the rocks

(Testimony of Erick Lindstrom.)

about eight feet long and fixed it so it could be connected, and fastened the chain around the rocks, and attached 25 feet of wire cable to the chain with a wire clamp and used a cedar head, four feet long by eight inches square, and spiked the numbers to the buoys. These numbers were painted on boards six or seven inches wide and about twenty inches long, and painted with light lead color, and the numbers were painted on with black lamp black and oil, and the numbers were very plain—anybody could see them. The length of the figures were about seven inches. All that I did with these buoys was I planted them and left them. I planted them in front of Sites numbered Two and Three, my two locations in [311] front of Site Two and one in front of Site Three. On the Columbia River side of the stream at low tide the inside buoy was below low tide towards the Columbia River. These buoys were planted about 500 feet apart, I would judge. I haven't the exact measure. I planted them there on the 16th day of June, 1908. After they were planted there, we three together, the defendants McGowan, Coyle and myself, secured two men to look after the proposition.

Q. Did you take any steps to procure the gear, nets and other paraphernalia necessary to fish the locations?

A. All the steps were taken; they were brought into the office to be in position to order the gear. We figured out what gear it would take and put the order into the office, to order all our stuff.



(Testimony of Erick Lindstrom.)

Q. Did you fish the location? A. I did not.

Q. Why didn't you continue operations there?

A. They had papers served on us; we couldn't do it.

Q. What do you refer to by the papers served on you; was it the injunction in this suit?

A. We were stopped by the Columbia River Packers' Association from taking any further steps, fishing in the location, by the injunction in this suit. Since that time we made no further attempt to fish the ground.

(Witness continuing:)

I was intending to fish my three locations in 1908. I looked on Sand Island as one of the best fishing grounds on the river. I have been a fisherman since childhood, and that was one of the grounds where I could make money, but could not do it on account of being pushed off the earth.

If it had not been for the injunction that was served in this suit I would surely have fished these locations of mine, [312] and I would have continued to fish as long as I had the legal right to do so. According to the arrangements I had with McGowan I had the right to sell my fish and get the money, provided I sold the fish to McGowan at the regular market price.

I know the market price of salmon during the year 1908. It was five and a half and seven cents. The cannery salmon sells for less than the big salmon. For any fish up to thirty pounds the price was five



(Testimony of Erick Lindstrom.)

cents per pound, and above that seven cents. During the subsequent years the price was raising—the first two years was about a stand-off, and last year it was six and one-half and seven and one-half. This was the price paid on the grounds. We never had to pay for delivery. The launches pick them up and we get the same price as when delivered at the cannery.

Q. Can you tell what, in your opinion, was the reasonable quantity of salmon to catch at the locations where you located your set nets, per season, considering the eight nets as being operated as they were located?

To this question counsel for plaintiff then and there objected upon the ground that it was incompetent, irrelevant and immaterial and not the proper rule to the measure of defendants' damages.

A. I would not call myself a fisherman at all if I could not average fifty tons a year out of my location. (Witness continuing:)

I think that was a reasonable quantity to be produced from my three set nets. I used my own judgment in making my locations and the other defendants used theirs. I could not tell which was the best location. I presume probably they would average pretty near as good. [313]

Q. What would it have cost you to operate these eight nets per season, in your opinion?

To this question counsel for plaintiff then and there objected upon the ground that it was immaterial and irrelevant.

(Testimony of Erick Lindstrom.)

A. I am poor in figures, but the three of us figured it out together, and the total amount was \$3,000 for the season.

Cross-examination.

(Interrogated by Mr. FULTON.)

I live at McGowan and I have a wife and nine children. I am working on one job and another, working for P. J. McGowan and Sons. This is a corporation of which H. S. McGowan is general manager and president. They have a cannery at McGowan, but they have moved their cannery business down to Ilwaco. McGowan is now just a receiving station, warehouse and office. They get their salmon down to Ilwaco by their fishing launch. This launch runs in the water. We navigate the waters inside of Sand Island to Ilwaco. Fishing launches navigate these waters between Sand Island and the Washington shore on high tide whenever they have anything to ship. This cannery was moved from McGowan to Ilwaco about six years ago, I think—five or six years. It was moved down there by P. J. McGowan and Sons, and they have been operating a cannery at Ilwaco ever since. The only way they have of receiving fish is by boats navigating the waters of Bakers Bay north of Sand Island.

I have been working for P. J. McGowan and Sons since 1895 on a salary. I began working there in 1895, and have worked there ever since excepting one season. I couldn't remember just what year that was that I didn't work. I was working for P. J. McGowan and Sons in 1908 on a salary. [314]















